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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X
UNITED STATES OF AMERICA : 13-CR-607

-against- US District Court
Central Islip, NY

PHILLIP A. KENNER a/k/a
PHILIP A. KENNER, and
TOMMY C. CONSTANTINE a/k/a June 22, 2015
TOMMY C. HORMOVITIS, 9:50 am

Defendants.:
- - - - - X

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Government:

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United States Attorney
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Brooklyn, New York 11201
By: JAMES MISKIEWICZ, ESQ.
SARITA KOMATIREDDY, ESQ.
United States Attorneys

For the Defense:

RICHARD D. HALEY ESQ.
For Defendant Kenner

ROBERT LaRUSSO, ESQ.
For Defendant Constantine

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Proceedings recorded by mechanical stenography.
Transcript produced by CAT.

Dominick M. Tursi, CM, CSR
Official US District Court Reporter

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1 (Call to Order of the Court. Appearances stated
2 as indicated above.)

3 (The following ensued in the absence of the
4 jury.)

5 THE COURT: The jurors are all here.

6 Before I forget, I wanted to ask the government
7 to email my clerk the redacted indictment. You have taken
8 out the AKAs?

9 MS. KOMATIREDDY: Yes, judge.

10 THE COURT: So we can use that for the charge.
11 Are we ready for the jury?

12 MR. HALEY: Your Honor, no.

13 May I address the court. I did alert your clerk
14 to a matter that from my perspective needs to be addressed
15 before the jury is brought into the courtroom. And I
16 believe addressing this matter may actually serve to
17 facilitate our timeline rather than further delay the
18 timeline with the jury.

19 Your Honor, when we concluded on Thursday, the
20 court will recall that Mr. Kenner had left the witness
21 stand having been asked a series of questions by
22 Mr. LaRusso and then questions by Mr. Miskiewicz
23 concerning the conversation he had with Tommy Constantine
24 outside the Home Depot. I know your Honor's fully
25 familiar with the testimony in that regard.

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1 Your Honor may recall that at one point during
2 the course of his testimony I asked one question because
3 it there was some confusion as to whether or not
4 Mr. Kenner's testimony with reference to Ken Jowdy and
5 Louis Freeh mentioned took place within that 26 or
6 27-minute excerpt of the recorded conversation or whether
7 it took place at some point thereafter because there was
8 testimony actually that conversation was longer than 26 or
9 27 minutes; that it was actually I believe possibly 56
10 minutes.

11 The hearing, from my perspective, the inquiry,
12 from my perspective, then concluded. I did not further
13 question my client from that point on. I don't know that
14 I said I had no further questions.

15 I know that when the hearing concluded before
16 the court, I then had opportunity to confer with my
17 client. I have conferred with my client since that
18 testimony and I believe, your Honor, that if we complete
19 his testimony by way of my questioning my client, the
20 record will be complete.

21 And it is my belief that that testimony will,
22 subject to your Honor's determination, result in the
23 authentication of that tape that the government has in its
24 possession as relates to that 26 or 27 minutes of
25 conversation. Before we do so, judge --

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1 THE COURT: I just want to understand what you
2 are asking me. But again, we have the jury waiting. We
3 have to be sensitive to their time Mr. Haley.

4 I'm happy to continue the hearing but, as we did
5 last week, I want to do it when the jury not sitting back
6 there waiting.

7 I assume that you are not up to that point in
8 your direct examination. I'm sure you have other things
9 you need to cover.

10 MR. HALEY: I do. Thank you, judge. I will
11 move forward.

12 THE COURT: I will get to it at the lunch break.
13 I am happy to let your client clarify or add to what he
14 said.

15 MR. HALEY: There is some additional information
16 I'm waiting for. That will work better. I just wanted to
17 alert the court, at the earliest possible opportunity, to
18 the issue.

19 THE COURT: Fine. I don't have any other
20 matters at lunch today so we can certainly do it at lunch
21 time. Or, if you are up to that point before lunchtime,
22 we will take a break and do it then.

23 MR. HALEY: Thank you, Judge.

24 THE COURT: Are we ready to go?

25 MR. HALEY: Yes.

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1 THE COURT: Mr. Kenner, you can come back to the
2 witness stand.

3 Let's bring in the jury.

4 (The following ensued in the presence of the
5 jury at 10 am.)
6

7 **PHILLIP A KENNER**

8 called by the Defense, having been previously
9 duly sworn/affirmed, continued testifying as
10 follows:

11 THE COURT: Good morning, members of the jury.
12 Good to see all of you. I hope you enjoyed the weekend
13 and Father's Day.

14 We are ready to continue with the trial. As you
15 know, Mr. Kenner is on direct examination so we will
16 continue from that point.

17 Mr. Kenner, I remind you that you are still
18 under oath.

19 Do you understand?

20 THE WITNESS: Yes, sir.

21 THE COURT: Go ahead, Mr. Haley.

22 MR. HALEY: Your Honor, with the court's
23 permission, may I just read out of the record the last two
24 questions asked of Mr. Kenner so we can acclimate
25 ourselves?

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1 THE COURT: Yes.

2 MR. HALEY: Thank you.

3

4 DIRECT EXAMINATION (Continued)

5 BY MR. HALEY:

6 Q. Page 4502 of the transcript, involving Kenner
7 Direct/Haley.

8 Question: When you finally received the
9 spreadsheet reflecting the disbursements of the Global
10 Settlement Fund, you reviewed those disbursements. Is
11 that correct?

12 Answer: Yes, I did.

13 *"Question: The email that you wrote to your*
14 *clients expressing your view that Tommy Constantine had*
15 *misappropriated GSF fund, that went out actually before*
16 *you removed the detailed list of disbursements. Is that*
17 *your testimony?*

18 *Answer: I believe in about that time I'd sent*
19 *out a number of email updates to my clients to let them*
20 *know the status of what was going on, and that probably*
21 *continued through sometime in 2011."*

22 That is when we finished your testimony,
23 Mr. Kenner.

24 Now, with respect to emails that you referenced
25 in your testimony, have you seen those emails before

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1 today, sir?

2 A. I have seen a few of them, yes.

3 Q. Mr. Kenner, I'm going to ask you to take a look at a
4 document marked Kenner Exhibit 233. I believe you have
5 familiarity with the document, Mr. Kenner.

6 You can look at the entire document, to be sure,
7 but just take a look at it now.

8 A. Yes, sir. I recall this document.

9 Q. What is it?

10 A. This was one of the series of updates I had sent
11 along to my client base related to both the legal efforts
12 in Mexico and a commentary on the Global Settlement
13 issues.

14 It was sent out April 19, 2011.

15 Q. Well, it reads: "*Gentlemen.*"

16 Could you just for purposes be of
17 authentication, who did you, to the best of your
18 knowledge, send that to by way of the category called
19 *gentlemen*?

20 A. This would have been sent out to certainly each of
21 the individuals who contributed money to the global
22 settlement fund that I believe we saw on the spreadsheets
23 when Jay McKee was on the stand. And it would have also
24 included other individuals who may or may not have been
25 participants in the global settlement fund that were also

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1 investors in one or both of the Mexican projects with Ken
2 Jowdy.

3 Q. And is that a copy of the email, sir?

4 A. Yes, sir, it is.

5 Q. How did you acquire that copy?

6 A. This email was given to, delivered to you by the US
7 government, and then subsequently you delivered it to me
8 in pretrial for review.

9 Q. Is that a true, accurate, and complete copy of the
10 email that you sent out to the persons you have now
11 identified?

12 A. Yes, sir, it is a true, accurate, and complete copy.

13 MR. HALEY: Your Honor, I would offer that as
14 Kenner Exhibit 233.

15 MR. MISKIEWICZ: No objection.

16 MR. LaRUSSO: Can we have a side bar.

17 (Continued on the following page.)
18
19
20
21
22
23
24
25

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1 (Discussion at sidebar ensued as follows.)

2 MR. LaRUSSO: The only objection I have, Judge,
3 is to this paragraph here.

4 As I understand it, this email, and I cannot
5 read it correctly, is Kenner to Kenner on April 19, 2011,
6 which is about a year and a half after the Global
7 Settlement Fund disbursements concluded. They concluded
8 sometime around the end of 2009, beginning of 2010.

9 This is just out-of-court statements by
10 Mr. Kenner and I don't think this hearsay should be
11 permitted. I have no objection to the rest of it but that
12 part I don't think should be permitted at this point.

13 MR. HALEY: May I may an offer of proof, judge?
14 The more operative paragraph was paragraph 3. It says,
15 reading it -- no, paragraph 2. As you are --

16 THE COURT: I read it. Why do you needing that?

17 MR. HALEY: Judge, the efforts taken by my
18 client once he learned from his perspective that Tommy
19 Constantine misappropriated the settlement funds were not
20 kept to himself.

21 THE COURT: Okay.

22 First of all, he already testified Thursday
23 regarding his belief of, quote-unquote, the
24 misappropriation of funds. He just testified further that
25 he notified his clients of that.

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1 So it is already all out there. All this is is
2 an email memorializing what he already testified to that
3 he sent to his clients. So the jury has already heard it.
4 I don't know why he shouldn't be able to corroborate what
5 he just testified to without objection regarding the
6 email.

7 I will give an instruction to the jury. As I
8 have on other occasions, that this information is not
9 being offered for the truth but simply Mr. Kenner is
10 offering as to his state of mind. And you can obviously
11 cross him on this.

12 MR. LaRUSSO: Okay.

13 MR. HALEY: If anyone makes a request to redact
14 any portions of it, but maybe --

15 THE COURT: You don't want that redacted, that
16 portion. You want that portion.

17 MR. HALEY: No.

18 MR. LaRUSSO: But I would like it all in context
19 at some point.

20 (Discussion at sidebar was concluded.)

21 (Continued on the following page.)

22

23

24

25

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1 (The following ensued in open court.)

2 MR. HALEY: Offer this as Kenner Exhibit 233.

3 THE COURT: K233 is admitted.

4 Let me giving you an instruction similar to what
5 I gave previously but I want to remind you as relates to
6 this particular exhibit.

7 Exhibit K233, which is the email from Mr. Kenner
8 to other individuals, is not being offered for the truth
9 of the information contained in the email. Mr. Kenner is
10 permitted to offer that email on what is called his state
11 of mind, what his state of mind was at the time of the
12 email.

13 You can only consider it for that purpose, not
14 the truth of whatever statements he put into that email.
15 Okay?

16 With that instruction it is admitted.

17 (Defense Exhibit K233 in evidence.)

18 MR. HALEY: Your Honor, though introduced into
19 evidence, may I simply for the record read a portion?

20 THE COURT: Sure.

21 BY MR. HALEY:

22 Q. For purposes of the record, Mr. Kenner, would you
23 follow along with me this paragraph of that email.

24 "As you are all aware, Constantine has
25 misappropriated the lion's share of the GSF (Global

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1 *Settlement) Funds, that would have been a great assistance*
2 *to us in the Mexican pursuit of Jowdy, for his own*
3 *benefit. It has left me with very few financial optioning*
4 *while trying not to quit our legal pursuits."*

5 Now, you testified that there were other emails,
6 sir, that you believe you wrote regarding your belief
7 concerning misappropriation of GSF funds by
8 Mr. Constantine.

9 Is that correct?

10 A. Yes, sir.

11 Q. I want you to take a look at Kenner Exhibit 234.

12 A. Yes, sir, I'm aware of this.

13 Q. And just what is it? Without telling us the content
14 of it, sir.

15 A. This appears to be a March 23, 2011, email between
16 myself and my clients Michael and Kristin Peca with
17 respect to just general updates that were going on at that
18 time with respect to them, personally, and the overall
19 group of Mexican investors and individuals who may have
20 invested in the Global Settlement Fund.

21 Q. Is that one of the emails you referred to that
22 involved a belief on your part that Tommy Constantine had
23 misappropriated GSF funds and you so advised your clients?

24 A. That is correct.

25 MR. HALEY: Your Honor, I'm not going to offer

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1 this in evidence but let me show it to counsel.

2 (There was a pause in the proceedings.)

3 BY MR. HALEY:

4 Q. Now, Mr. Kenner, you testified that you also at some
5 point received a list reflecting the disbursements that
6 came out of the escrow account of Mr. Richards as relates
7 to GSF.

8 Is that correct?

9 A. Yes, sir.

10 Q. Let me show you I'm pretty sure what is already in
11 evidence as Government Exhibit 767. Take a look at this
12 document.

13 A. I'm familiar with Government Exhibit 767.

14 Q. What is it?

15 A. This is a copy of the spreadsheet that Ronald
16 Richards had forwarded to me after January 1 of 2010, that
17 reflects all the incoming and outgoing lawyers for the
18 Global Settlement Fund and also contains notes or a note
19 column with respect to where we believe the funds were
20 appropriated.

21 Q. Now, sir, with that list in your possession, could
22 you kindly tell us what disbursements contained within
23 that list that you maintained were or are inconsistent
24 with the purposes of the Global Settlement Fund as forth
25 in the previous emails.

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1 A. Pursuant to my understanding of what Mr. Constantine
2 proposed to myself and the rest of the individuals who
3 contributed to the fund.

4 On May 12 of 2009, there was a disbursement to
5 Kerry Rodriguez Greenberg, who I believe was
6 Mr. Constantine's Miami attorneys and not related to any
7 of the other matters in the Global Settlement Fund.

8 On the same day there was a disbursement to
9 Sonnenschein, which is a Los Angeles law firm, which I was
10 unaware of what the relationship was to the Global
11 Settlement Fund.

12 On May 18, 2009, there was a disbursement to
13 Earl Curley & Lagarde, which is an Arizona law firm which
14 I am unaware of what the purpose of that was related to
15 the Global Settlement Fund.

16 On May 18, 2009, there was a disbursement to
17 Silver Law, PC, which is an Arizona attorney, that I was
18 unaware of what Mr. Constantine's purported relationship
19 with the Global Settlement Fund was.

20 On May 22, 2009, there was a disbursement to
21 Chase Bank, I believe to Dickinson Architects, which I'm
22 unaware of what the relationship was to the Global
23 Settlement Fund.

24 On May 26, 2009, there is a disbursement to
25 Sullivan and Cromwell, which I believe was a large New

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1 York law firm but I am unaware of what the relevance was
2 to the Global Settlement Fund.

3 On May 27, 2009, there was a disbursement to a
4 Lions Bank of Arizona, which I believe was the Eufora bank
5 account, which I was unaware of why there would be funds
6 disbursed to Eufora at that point in time pursuant to what
7 was represented was the purpose of the Global Settlement
8 Fund by Mr. Constantine to myself and the other
9 contributors.

10 On May 29, 2009, there is a disbursement to
11 Johnson Bank, I believe to the law office of Steven
12 Negden. I'm unaware of what the relevance was to the
13 Global Settlement Fund.

14 On June 8, 2009, there is a disbursement to
15 Cabin Crafters, which I believe was for repairs to the
16 Falcon 10 airplane, which was never represented as one of
17 the purposes of the Global Settlement Fund.

18 On June 10, 2009, there was another disbursement
19 to Eufora's bank account.

20 On June 10, 2009, there is a disbursement to a
21 gentleman named Sean Hayden. I'm unaware of what that had
22 to do with the Global Settlement Fund.

23 On June 16, 2009, there is a distribution to
24 Aftrak LLC, but I'm unaware of what that had to do with
25 the Global Settlement Fund.

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1 On June 17, 2009, there is a distribution to
2 Supermarine of Stewart. I believe that was related to the
3 Falcon but I'm unaware of why that was distributed
4 personally due to the representations of the Global
5 Settlement Fund.

6 On June 30, 2009, there was a distribution to
7 Preferred Environmental, which I'm unaware of what its
8 relevance was to the Global Settlement Fund.

9 On July 7 there is distribution to a Lions Bank
10 of Arizona, I believe to the Eufora bank account. I'm
11 unaware of why a Global Settlement was making a
12 disbursement to Eufora's bank account.

13 On July 21 there is another distribution the
14 Lions Bank of Arizona to Eufora's bank account.

15 On July 21 there is another distribution to
16 Steven Negden, the law offices of Steven Negden.

17 On July 21 I believe there is two distributions
18 to a Lions Bank of Arizona, to Eufora's bank account.

19 On August 7 there are two distributions to Bank
20 of America to the bank account for Avalon and Partners,
21 which I'm unaware of why that was made, pursuant to the
22 terms of the Global Settlement.

23 On August 10 there is a distribution to Johnson
24 Bank, to Eufora's bank account again.

25 On August 31, 2009, there is another

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1 distribution to Eufora's bank account in Alliance Bank.

2 On September 2, 2009, there is another
3 distribution to Eufora's bank account at Alliance Bank.

4 On September 15, 2009, there is a distribution
5 to Edenholm Motorsports, which I'm unaware of why that
6 distribution was made pursuant to the Global Settlement
7 Fund.

8 On September 15, 2009 there is a distribution to
9 AZ Falcon Partners.

10 On September 25, 2009, there is a distribution
11 to Back of America to Avalon Partners' bank account.

12 On October 13, 2009, there is a distribution
13 again to Kerry Rodriguez, which I believe is the same as
14 the previous Kerry Rodriguez Greenberg, the Florida
15 attorney for Mr. Constantine. I'm unaware of the purpose
16 of that pursuant to the Global Settlement Fund.

17 On October 21, 2009, there is a distribution to
18 AZ Falcon Partners. I'm unaware of why that distribution
19 was made pursuant to the terms of the Global Settlement
20 Fund.

21 On October 28, 2009, there is a third
22 distribution for Kerry Rodriguez Greenberg.

23 On November 6, 2009, there is a distribution to
24 Eric Edenholm.

25 On November 23, 2009, there is another

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1 distribution to Eufora LLC's bank account.

2 Q. Thank you, Mr. Kenner.

3 Incidentally, Mr. Kenner, do you recall,
4 Government Exhibit 767 was actually, you distributed this
5 to one or more of your clients. Is that right?

6 A. Yes. We had both June McKee testify to receiving it
7 and having no questions. And Mr. Nash also received it.
8 And we had a meeting pursuant to his receipt of the
9 spreadsheet.

10 Q. Was there ever an instance, sir, where a hockey
11 player client of yours, as relates to this case, requested
12 that disbursement sheet and you refused or declined to
13 provide it?

14 A. Never.

15 Q. Mr. Kenner, I'm going to read a portion of the
16 indictment that has the heading *The Led Better Fraud*
17 *Scheme*.

18 Within the indictment, itself, it contains
19 various paragraphs but let me read into the record
20 paragraph 21.

21 *"In or about and between October 2006 and May*
22 *2012, the defendant Phillip A Kenner, also known as Philip*
23 *A Kenner" -- this time with only one L, "devised,*
24 *supervised, and executed a scheme to defraud certain of*
25 *the investors of money and property, the purchase of real*

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1 *property located in Sag Harbor, New York (the Sag Harbor*
2 *Property). John Doe 10, John Kaiser, and others had owned*
3 *the Sag Harbor property since 2005."*

4 Let me read the next paragraph as well for
5 purposes of following the questions that are about to
6 follow.

7 *"As part of the scheme to defraud, in or about*
8 *October 2006 the defendant Kenner created Led Better*
9 *Development Company LLC (Led Better) a Delaware limited*
10 *liability company, for the purpose of purchasing the Sag*
11 *Harbor property.*

12 *"Thereafter, Kenner created an operating*
13 *agreement stating that Kenner, Berard, Kaiser, and another*
14 *individual, Vincent Tesoriero whose identity is known to*
15 *the grand jury, who were each to be 25 percent owners of*
16 *Led Better. Kenner did not disclose the operating*
17 *agreement to Berard and Kaiser prior to or at the time of*
18 *the purchase of the Sag Harbor property."*

19 Again, Mr. Kenner, there are other paragraphs
20 that follow that relate to that aspect of the indictment,
21 but for purposes of my questions from this point on I'm
22 going to be questioning you with respect to Led Better.

23 Do you understand that?

24 A. Yes, sir.

25 Q. When the Lehman loan closed, what occurred with

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1 reference to discussions you had with John Kaiser, not
2 only concerning his desire that his investment money be
3 returned to him, as I believe you previously testified to,
4 but his relationship with Chris Manfredi?

5 A. There were two main issues that John Kaiser had prior
6 to the closing in August of 2006 and the Lehman Brothers
7 \$105 million financing of the Hawaii project venture.

8 One in particular was that Mr. Kaiser had become
9 at great odds with Manfredi during that period of time
10 because Mr. Manfredi was upset that we were no longer
11 going to control the joint venture going forward but it
12 was gong to fall under somebody else's control and he was
13 afraid he was going to lose his job.

14 So he effectively demanded, Manfredi effectively
15 demanded, to receive a \$175,000 payout at the closing or,
16 he told both Mr. Kaiser and I one night at dinner in New
17 York City, he was going to withhold his signature, which
18 would in effect have canceled the deal. Mr. Kaiser and
19 Manfredi didn't speak from that dinner on I believe until
20 years later.

21 Subsequent to that meeting, I had worked out an
22 arrangement with Mr. Manfredi, and had agreed to his terms
23 in the context that I wanted to make sure that the rest of
24 the deal closed for the rest of the investors.

25 Mr. Kaiser at that point, who was furious with

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1 Mr. Manfredi for his effective extortion tactics with us,
2 then proposed to me that in order for him to sign off, he
3 would want to be repaid 100 percent of his investment that
4 he had made on behalf of his friends and family in August
5 of 2005, and as a result he told me that he had a real
6 estate project in Sag Harbor, New York, that Manfredi was
7 one of the partners and that he would not go forward with
8 Mr. Manfredi at that point.

9 He told me that in order for him to sign off,
10 for Mr. Kaiser to sign off on the Lehman Brothers deal in
11 August of '06, he was going to need an approximate
12 \$400,000 short-term loan to buy out Mr. Manfredi's joint
13 partner at this time, Mr. Thomas Milana, who was unknown
14 to me.

15 So in order to facilitate the closing of the
16 deal, I agreed to those two terms with Mr. Kaiser.

17 Q. Was the discussion you had with Mr. Kaiser such that
18 Manfredi was going to know of this buyout of his interest
19 and who was behind?

20 A. No. In fact, the purpose behind the approximate
21 \$400,000 Short Term loan is so the funds would come from a
22 source unrelated to Mr. Kaiser or anyone else that
23 Manfredi knew, because effectively Mr. Kaiser wanted Mr.
24 Manfredi out of the deal without any recovery of invested
25 assets, which I was unaware at the time whether Manfredi

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1 had any invested assets in the project or not.

2 Q. This statement that Mr. Kaiser made to you as to how
3 he wanted Manfredi out of the North Point property -- that
4 is what it was called; correct?

5 A. Yes, sir.

6 Q. Who was present during that conversation? If anyone.

7 A. Just Mr. Kaiser and myself.

8 Q. Vincent Tesoriero testified in this case. Is that
9 correct?

10 A. Yes, sir, he did.

11 Q. Prior to his testimony did you have any conversations
12 with him or communications with him in any fashion
13 whatsoever regarding Mr. Kaiser's statement to you that he
14 wanted Manfredi out of the North Point Property?

15 A. I had not met Mr. Tesoriero at that point in time. I
16 didn't meet him until months and months later.

17 Q. And would you tell us the circumstances under which
18 you came as to meet Mr. Tesoriero.

19 A. He was flown to my house in Arizona to work on a
20 renovation project that Mr. Kaiser was overseeing.

21 Q. Any discussions regarding Led Better at that point in
22 time between the two of you?

23 A. To the best of my recollection, they were very brief,
24 and primarily in the context of how the architecture and
25 design plans had been moving along, as Vinny -- excuse me,

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1 Mr. Tesoriero was wondering when he was going to start
2 working on that vertical construction.

3 Q. Okay, Mr. Kenner. There comes a point in time where
4 we know, as set forth frankly in the exhibit we introduced
5 regarding the Peca line of credit and distributions out of
6 this line of credit, that \$395,000 from his line of credit
7 is transferred to John Kaiser. Is that correct?

8 A. Yes. It was through Little Isle IV's bank account
9 and perhaps also through Ula Makika's bank account also.
10 I don't recall.

11 Q. Would you kindly explain, sir, the purpose of that
12 transfer and, frankly, what occurred as relates to the
13 transfer, and the trail of monies thereafter.

14 A. Yes.

15 Pursuant to the agreement I had made with
16 Mr. Kaiser to secure his signature, which was required by
17 Lehman Brothers to fund the \$105 million lending agreement
18 in August of 2006, prior to that I had agreed with
19 Mr. Kaiser that I would make available a \$400,000 loan to
20 him.

21 About a month and a half after the closing, in
22 August of 2006 with Lehman Brothers, Mr. Kaiser told me he
23 was ready to close on that property and asked if I could
24 prepare a new LLC that would be in my name, but for
25 purpose of signatures he asked if I had another person who

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1 could sign as the manager of Led Better, just for the
2 purpose of signing the closing documents.

3 So I prepared all of that information and passed
4 it on to our attorney Shimon Betesh, who testified here
5 early in the trial, so he could prepare the proper
6 documents for closing.

7 At that point Mr. Kaiser informed me that he was
8 ready to do the transaction, so pursuant to our previous
9 arrangements, I had wire-transferred \$395,000 to a new
10 company, that being Led Better Equipment Company.

11 Eleven days after the closing, those funds, once
12 they were disbursed to Mr. Kaiser through the North Point
13 property sale escrow, he returned \$380,000 back to Ula
14 Makika to repay the 11-day loan. Mr. Kaiser kept \$15,000
15 glass of the original loan at that point, which was
16 equivalent to about what Mr. Kaiser had been taking as a
17 fee from the Hawaii project so I had no problem with that
18 at that time.

19 But he did return \$380,000 of the \$395,000 to
20 Ula Makika, and then those funds date in Ula Makita's bank
21 account, which was the possession of the Hawaiian
22 partners, until subsequent expenses of the company were
23 paid.

24 Q. We will get to that in a moment as relates to the use
25 of the monies that were returned ultimately to the Ula

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1 Makika account.

2 That \$395,000, as we know, came out of Peca's
3 line of credit. Correct?

4 A. Yes, sir, it did.

5 Q. At that point in time, sir, what if any document was
6 in existence that permitted Little Isle IV or Ula Makika
7 to lend money to anyone?

8 A. There were in that series of events first and
9 foremost Mr. Peca had signed a letter of authorization
10 directly with Northern Trust bank authorizing the use of
11 his line of credit for the benefit of Little Isle IV's
12 bank account.

13 So when the funds were removed from Mr. Peca's
14 line of credit, they were transferred, pursuant to that
15 arrangement, to the Little Isle IV bank account.

16 Little Isle IV, pursuant to the 2004 operating
17 agreement signed by both myself and Mr. Kaiser in or about
18 September of 2004, allowed Little Isle IV to lend money
19 pursuant to the acknowledgement of the managed member, who
20 was myself at a time.

21 So pursuant that agreement, I had the authority
22 to lend money. And I had agreed with Mr. Kaiser previous
23 to the Lehman Brothers closing to lend him that short-term
24 \$395,000 loan, which he repaid 11 days later.

25 Q. What level of awareness did your hockey player

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1 clients have in connection with that operating agreement
2 or other operating agreements?

3 A. When any of my clients, or other investors who were
4 not my clients, invested in the Hawaiian partnership, they
5 would be given a copy of the most recent operating
6 agreement and then, subsequent to new bylaws or operating
7 agreements being created for the company through the
8 completion of the Lehman Brothers functioning in August of
9 2006, they would be given, each and every one of them
10 would be given updated bylaw or operating agreement as it
11 related to the previous one that was in effect.

12 Q. Okay. So the 395 doesn't come back to Mr. Kaiser;
13 only 380 comes back. Is that correct?

14 A. That is correct.

15 Q. What then, to your personal knowledge, occurs as you
16 relates to that 380 that is returned to the Ula Makika
17 Little Isle IV bank account?

18 A. On a monthly basis, even following the Lehman
19 Brothers transaction, there were a number of ongoing
20 commitments that Hawaiian partners, Little Isle IV, still
21 had to make.

22 So from that point forward, there was a
23 distribution to myself for \$200,000 which was pursuant to
24 an environmental indemnity agreement with respect to the
25 Lehman Brothers closing.

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1 Lehman Brothers required. Because of a known
2 petroleum problem on one of the parcels adjacent to the
3 258 and 1,500 acre unlawful site they required that there
4 was a personal indemnity to Lehman Brothers so in the
5 event that there was a seepage from petroleum pits into
6 the water source in the local community, Lehman Brothers
7 did not want to be held responsible for that.

8 So I signed the personal indemnity on the \$105
9 million loan in order to facilitate that. I could have
10 put all of my clients in harm's way on that but instead I
11 agreed with Mr. Kaiser and Mr. Manfredi that I would take
12 on that risk and responsibility in return for a three
13 payments over a five-year period of time that represented
14 less than point five percent of the funds at risk.

15 So \$200,000 about six weeks after Mr. Peca's
16 funds were returned by Mr. Kaiser were sent to me, and
17 then there were a series of other consulting payments and
18 expenses of the Hawaiian partners that were paid out of
19 those residual funds.

20 Q. That environmental indemnity agreement, does it
21 exist?

22 A. Yes, sir, it does.

23 Q. Have you seen it?

24 A. Yes, sir, I have.

25 Q. Since your arrest did you see it?

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1 A. Yes, sir, I have.

2 Q. And how did you acquire it following your arrest?

3 A. The environmental indemnity agreement was turned over
4 by the US government to you, and then subsequently you had
5 provided that to me for review in pretrial.

6 Q. Brian Berard had testified in this proceeding that he
7 also contributed toward the financing of the Led Better
8 project, for lack of a better term.

9 Do you recall that?

10 A. Yes, sir, he did.

11 Q. And how much did he contribute in order that John
12 Kaiser could purchase the property in order to buy out
13 Chris Manfredi and Mr. Milan?

14 A. I believe Mr. Berard contribute \$375,000.

15 Q. And would you tell the court and jury the
16 conversation you had with Mr. Berard as relates to his
17 commitment to that money in the Led Better project?

18 A. Mr. Berard, prior to the August 2006 closing with
19 Lehman Brothers, had continued to tell me that he wanted
20 to get involved with more of my independent projects and
21 smaller investment groups, so when that opportunity came
22 up in or about the time of the closing with Lehman
23 Brothers I told Mr. Berard what was going on in Sag
24 Harbor. And because he had played with the New York
25 Islanders and the New York Rangers, I believe at the time

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1 he thought that was a great place, he was familiar with
2 the real estate and asked to get involved.

3 So prior to Mr. Berard's involvement, a number
4 of steps had to take place.

5 First, the operating agreement for Led Better
6 Equipment Corporation was created by myself and signed by
7 myself and comanager at the time, Miss Lauren Gilmore. It
8 represented a 25 percent interest to each of the four
9 members of the LLC, which was myself, Vincent Tesoriero,
10 John Kaiser, and Brian Berard.

11 As was a custom in my relationship with
12 Mr. Berard, he required that I send the operating
13 agreement and any other relevant documents to his family
14 attorney through him. Mr. Berard typically would review,
15 on every occasion, all those documents with his family
16 attorney before he returned them to me and agreed to
17 participate.

18 Now with respect to his \$375,000, Mr. Berard,
19 his only concern was that he was going to be able to
20 reduce, he was going to be able to retrieve the funds to
21 make available for the Led Better contribution from the
22 paydown of collateral that had occurred during the Lehman
23 Brothers closing on his line of credit.

24 So subsequent to the Lehman closing and the
25 initial paydown of Mr. Berard's line of credit, he

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1 communicated directly with Aaron Mascarella at Northern
2 Trust Bank, signed subsequent line-of-credit documents
3 which reduced his collateral requirement, and following
4 the completion of those documents, then either a portion
5 of the 375 or the entire \$375,000 was available at
6 Northern Trust, and Mr. Berard wire-transferred those
7 funds to Led Better Development Corporation.

8 Q. Now, you testified that Mr. Berard received a copy of
9 the Led Better operating agreement. Is that correct?

10 A. Yes, sir, just like Mr. Kaiser did.

11 Q. As set forth in the document, itself, what was his
12 percentage interest in Led Better?

13 A. 25 percent.

14 Q. Well, were you present when Mr. Kaiser testified that
15 you proposed or told him he could obtain a 50 percent
16 interest in Led Better Development Group for his monetary
17 expense?

18 A. During Mr. Kaiser's testimony?

19 Q. Excuse me. During Mr. Berard's testimony.

20 A. Yes, I was present.

21 Q. Is that true: You told him that he would get 50
22 percent rather than 25 percent as reflected in the
23 document, itself?

24 A. That is untrue.

25 Q. Incidentally, Mr. Kenner, you testified that

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1 Mr. Berard expressed some interest in becoming involved in
2 some projects that you also had an interest in.

3 You had an interest in Led Better, isn't that
4 true?

5 A. Yes, I did.

6 Q. What was your interest?

7 A. It was a 25 percent interest.

8 Q. But you didn't contribute any capital to that
9 project, did you?

10 A. I did not up front.

11 Q. Well, what was the understanding that you had with
12 John Kaiser as to what you would contribute, do, to get 25
13 percent interest in Led Better when you hadn't made a
14 capital contribution?

15 A. What Mr. Kaiser knew, and one of the problems he had
16 with Manfredi and Mr. Milana, was that none of the
17 partners of North Point Properties could secure a
18 construction loan for the project they wanted to build.

19 The estimate by Mr. Kaiser was that it would be
20 between \$1.5 million and \$2 million for the construction
21 of the North Point property house in Sag Harbor, New York,
22 and Mr. Kaiser asked if I would be able to secure a
23 construction loan for that, which I told him there would
24 be no problems in doing.

25 So my contribution to the partnership was going

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1 to be the construction loan that I would secure in my own
2 name and taking the liability risk for.

3 Q. You were present when Mr. Manfredi testified?

4 A. Yes, I was.

5 Q. He had acquired a percentage interest in North Point
6 Property before Led Better purchased it. Is that correct?

7 A. Yes.

8 Q. When he obtained his 25 percent interest in North
9 Point Property, had he actually contributed capital to
10 that or was he performing some other of service? If you
11 know.

12 A. He contributed zero capital, which was consistent
13 interest with other deals that Manfredi and Mr. Kaiser
14 told me they had done in the past together, and he would
15 effectively be the manager of the project.

16 Q. So continuing, Mr. Kenner.

17 We know that the 380 comes back to Led Better.
18 You testified a moment ago as to how those monies were
19 subsequently used.

20 As relates to Mr. Berard's \$375,000 that he had
21 contributed to Led Better, what to your knowledge occurred
22 as relates to his contribution?

23 A. His funds were sent directly to the Led Better
24 Development Corporation bank account. And then, prior to
25 the escrow closing with Shimon Betesh, those funds were

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1 transferred to Shimon Betesh's escrow account.

2 I flew with Mr. Kaiser from the West Coast to
3 New York the day before the closing and then attended the
4 closing with Mr. Betesh. And upon completion of the
5 documents that day, Led Better Development Corporation
6 received all the paperwork at the close of escrow from
7 Mr. Betesh, Mr. Kaiser received a copy of it that day as
8 the seller and then he also received copies of all the
9 buyers' certificates on that particular day.

10 I then forwarded a copy of all of the buyers'
11 certificates that were signed and escrowed onto Mr. Berard
12 as well for his records.

13 Q. It is your recollection that you were present during
14 that closing, Mr. Kenner?

15 A. Yes, I was you. I flew from the West Coast the day
16 before. I stayed at Mr. Kaiser's house. And then
17 Mr. Kaiser and I drove out to see the property and do the
18 closing that day.

19 And then within 24 hours I was back on the West
20 Coast, having dinner in Seattle, Washington, with another
21 client of our.

22 Q. You were here when Mr. Betesh testified. Is that
23 correct?

24 A. Yes, sir.

25 Q. Do you recall whether he had memory of you being

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1 present at that closing?

2 A. I don't he recalled whether I was or not.

3 Q. How many people were at that closings, to your
4 memory?

5 A. I believe it was Mr. Betesh, another attorney,
6 myself, and Mr. Kaiser. And then a number of assistants
7 who were just came in and out with paperwork for us.

8 Q. During the course of that closing, did you have any
9 extended conversation with Mr. Betesh, if you recall?

10 A. Not in particular.

11 Q. Now, continuing.

12 What happened with Led Better following the
13 acquisition of the property which we know is in Sag
14 Harbor, not in Hawaii.

15 But my question is what happened with reference
16 to the property that was purchased by Led Better from that
17 point on, to your knowledge?

18 A. Well, I began to speak with Wells Fargo Bank as far
19 as creating a construction loan on the project.

20 At the same time -- and the reason Mr. Kaiser
21 and I traveled together from the West Coast is, we had
22 viewed another piece of real estate in Hermosa Beach,
23 California, in the two days prior.

24 At that point we were expecting to start
25 construction, at least engineering survey work and

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1 permitting, on the Sag Harbor property in or around the
2 end of 2006, beginning of 2007.

3 We were very fortunate, based on our previous
4 trip to Hermosa Beach, California, the days prior to the
5 Sag Harbor closing, to find out that we actually won a
6 judge's order to be able to purchase the Hermosa Beach
7 property.

8 So at that point Mr. Kaiser and I decided to put
9 the Sag Harbor property on hold as far as vertical
10 construction but to continue through with the permitting
11 engineering and survey work in Sag Harbor. And Mr. Kaiser
12 and I then renovated, over the next six to eight months,
13 the California beach house.

14 And we had planned at that point in time to come
15 back to Sag Harbor and begin construction approximately a
16 year later, which at that point in time just did not
17 happen. The real estate values in Sag Harbor continued to
18 go up, and at that point we figured, since the land was
19 worth, according to Mr. Kaiser's realtors, somewhere in
20 the neighborhood of \$1.5 million to \$2 million, we should
21 just sit on the land at that point in time.

22 And we looked for other projects, which in fact
23 we found one in Arizona close to my home.

24 Q. Now, while your focus and energies were devoted to
25 those other projects, your energy as well as Mr. Kaiser's,

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1 did something happen with reference to the Sag Harbor
2 property?

3 A. Well, in or about 2011, unknown to me -- excuse me.

4 In or around 2010, Mr. Kaiser contacted me when
5 we talked about just putting the piece of land up for sale
6 and asked me if I was aware that we had lost the property
7 to Suffolk County in a tax conveyance. And I was as
8 shocked as he was at the time.

9 And because we owned the property for cash, we
10 really hadn't thought about the property tax at that point
11 in time. All the property tax notices were being sent to
12 an old address, an old mailing address that I used, so we
13 were unaware that they were accruing at the time.

14 But when that occurred, I told Mr. Kaiser to
15 just go in to Suffolk County, explain to them what had
16 happened and tell them we would make good on all arrears
17 in tax payments.

18 So at that point in time I sent Mr. Kaiser a
19 wire transfer I believe for about \$28,500 and the next day
20 he went in to Suffolk County and cut a check to them for
21 approximately \$27,900 to make the tax conveyance back to
22 Suffolk County go away.

23 (Continued on the following page.)
24
25

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1 BY MR. HALEY:

2 Q. That money that went to Kaiser, what was the source
3 of that money?

4 A. It came from my bank account.

5 Q. At that point in time, was Mr. Berard's \$375,000
6 still committed to that property?

7 A. Yes, sir, it was.

8 Q. To your knowledge, Mr. Kenner, did the Sag Harbor
9 property ultimately get sold?

10 A. Yes.

11 I found out in or about 2012 that the Led Better
12 owned property in Sag Harbor was sold by Mr. Kaiser and
13 Mr. Berard although I was a managing member at the time.

14 So I made a series of inquiries into it and
15 found out that there was a new operating agreement created
16 that I was cutout of, and there was a signature of my
17 friend Lauren Gillmore on a brand-new operating agreement
18 which neither she nor Mr. Kaiser or Mr. Berard had legal
19 authority to sign since I was the managing member of Led
20 Better, but the property was sold unbeknownst to me.

21 I sent a series of demand letters to Mr. Kaiser
22 requesting that he pay me my proportionate share of the
23 Led Better fund proceeds based on the operating agreement
24 that we originally had signed.

25 All of those demand letters went unanswered and

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1 in 2013 I filed a lawsuit against Mr. Kaiser for that
2 dispute.

3 Q. With reference to Bryan Berard's original capital
4 contribution of \$375,000, you heard him testify in this
5 trial; is that correct?

6 A. Yes, sir, I did.

7 Q. To your knowledge, what occurred with reference to
8 that investment?

9 Did he get it back? Get part of it back? To
10 your knowledge, what occurred?

11 A. From what I understood, Mr. Berard received an agreed
12 upon portion of the proceeds from the Sag Harbor sale when
13 Mr. Kaiser and Mr. Berard decided to sell the property.

14 Q. Reflective of his \$375,000 capital contribution,
15 correct?

16 A. That's what I understood when I heard his testimony.

17 Q. Mr. Kenner, when you moved, transferred, \$395,000 out
18 of the operating account of Little Isle IV, Ula Makika,
19 which money is traceable to Mike Peca's line of credit
20 under the circumstances you described to us, did you do
21 so, sir, as part of an artifice or scheme to defraud
22 Michael Peca?

23 A. No, sir.

24 Q. When you recommended, or when you had conversations
25 with Bryan Berard concerning, as you testified to, his

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1 intention, desire, to become part and parcel of the Led
2 Better project, did you do so as part of an artifice or
3 scheme to defraud Bryan Berard?

4 A. No, sir.

5 Q. Mr. Kenner, let's move into what I'll call a
6 different sphere, Ken Jowdy.

7 There's been a great deal of testimony
8 concerning Mr. Jowdy in this trial, correct, sir?

9 A. Yes, sir.

10 Q. You know Mr. Jowdy, do you not?

11 A. Very well.

12 Q. And starting in about 2003, did you have a certain
13 business relationship with Mr. Jowdy; yes or no?

14 Do I have the year, correct?

15 A. It was 2002 we began our business relationship.

16 Q. Without describing to this Court and jury the
17 business relationship that you had with Mr. Jowdy, from
18 2002 up to a particular point in time, were you and he in
19 communication regarding those business relationships; yes
20 or no?

21 A. Yes, sir.

22 Q. And in what form did those communications take place?

23 A. Typically they would take place on the phone, many
24 times a day by text message and by e-mail communication.

25 Q. Was the business relationship that you had with

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1 Mr. Jowdy in effect in or about July 2005?

2 A. Could you restate the question, please?

3 Q. Sure.

4 There came a point in time, did there not,
5 Mr. Kenner, where there was -- I'll use the words a
6 falling out -- between you and Ken Jowdy; is that true?

7 A. Yes, sir, there was.

8 Q. Without belaboring the record, did that have
9 something to do with monies loaned from Little Isle IV,
10 Ula Makika, to Ken Jowdy, which remains unpaid to this
11 day?

12 A. Yes, sir, that's correct.

13 Q. Before that time, however, you had this business
14 relationship with Ken Jowdy, correct?

15 A. Yes, we did.

16 Q. I believe you told us a moment ago that you would
17 communicate telephonically and via e-mail; is that true?

18 A. Telephone, text and e-mail.

19 Q. Look at a document marked Kenner Exhibit 229.

20 MR. HALEY: Your Honor, both the government as
21 well as Mr. LaRusso have these documents. I was able to
22 deliver them prior to today.

23 A. Yes, I'm familiar with this.

24 Q. What is it, sir?

25 A. This is an e-mail that Mr. Jowdy had sent to me in or

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1 about July 2005 just representing as we were working on
2 closing the Cabo San Lucas deal, and he had a very
3 significant relationship --

4 Q. Well, don't testify to its content.

5 It's an e-mail between you and Mr. Jowdy; is
6 that correct?

7 A. Yes, sir, July 8, 2005.

8 Q. At that point in time, in July 2005, what, if any,
9 projects were you and Mr. Jowdy working on in a summary
10 fashion, Mr. Kenner?

11 A. Yes.

12 We had our initial project in Diamante Del Mar
13 which was in North Baja, Mexico, we were working on the
14 initial stages of the closing of the Diamante Cabo San
15 Lucas project, and we had a small company that had
16 purchased the Falcon 10 airplane that we heard a lot about
17 during this trial.

18 Q. Now, at that point in time, specifically on July 8,
19 2005, did you know where Mr. Jowdy physically was located?

20 A. He was in Mexico.

21 Q. Is that e-mail, sir, a true, accurate and complete
22 e-mail communication that you received from Ken Jowdy on
23 July 8, 2005, at 7:15 a.m?

24 A. Yes, sir, it is.

25 Q. How did you acquire that particular document

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1 identified as Kenner Exhibit 229?

2 A. This e-mail was turned over by the U.S. Government to
3 you during pretrial, and subsequently you had given it to
4 me for review.

5 MR. HALEY: Your Honor, I offer that as Kenner
6 Exhibit 229.

7 MR. MISKIEWICZ: No objection.

8 MR. LARUSSO: No objection, your Honor.

9 THE COURT: K 229 is admitted.

10 (Defense Exhibit K 229 in evidence.)

11 MR. HALEY: Your Honor, it's not that lengthy.
12 May I read it into the record?

13 THE COURT: Sure.

14 BY MR. HALEY:

15 Q. From Ken Jowdy, dated, subject RE:

16 Thanks... I didn't tell you that I now have
17 Benito driving the lead car, and Bob G. following behind
18 me... on a serious note, I had another conversation with
19 my FBI buddy today, who is serious about helping us...
20 the immediate challenge, other than keeping me alive down
21 here, is to provide professional security at the new FBO
22 at CSL.

23 I'll stop there for a moment, Mr. Kenner.

24 To your knowledge, who is or was Benito?

25 A. Benito was one of the individuals who worked for

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1 Mr. Jowdy in Mexico.

2 Q. To your knowledge, who is Bob G?

3 A. Bob G is Robert Gaudet, who was Mr. Jowdy's director
4 of golf at Diamante Cabo San Lucas.

5 Q. With reference to I have another conversation with my
6 FBI buddy today, did you come to learn, of your own
7 personal knowledge, who he was referring to?

8 A. Yes.

9 He was referring to John Behnke.

10 Q. Of your own personal knowledge, what, if any,
11 relationship does Ken Jowdy have with John Behnke today?

12 A. Since 2005, John Behnke has been the director of
13 security for Mr. Jowdy personally and the director of
14 security for Diamante Cabo San Lucas in Mexico.

15 Q. Okay.

16 Continuing: I am sending him all of the plans
17 as we get them today... we can't have a more solid and
18 respected guy... he has been with the secret service and
19 then with the FBI for more than 20 years, and spent about
20 eight years as a right-hand director of Louis Freeh, who
21 is not the director anymore, but is still one of his best
22 friends... anyway, when we get this thing started, he can
23 be a big help... and since he is probably somehow reading
24 this, I will say again what a great guy he is and what an
25 asset he would be to our organization... K.

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1 Who is K?

2 A. Ken Jowdy.

3 Q. From 2005 up until that moment in time when the
4 dispute between you and Ken Jowdy had occurred, you were
5 still in communication with Ken Jowdy during that period
6 of time via e-mail and other conversations; is that true?

7 A. Yes, sir.

8 Q. Once the dispute developed between you and Ken Jowdy
9 concerning the loan repayment and other matters that have
10 been alluded to during testimony, did you end up meeting
11 with Ken Jowdy to discuss these matters?

12 A. Yes, I did, in or about the spring of 2007.

13 Q. Where did that meeting take place?

14 A. In Cabo San Lucas at the home Mr. Jowdy was renting
15 at the time.

16 Q. Who was present during that meeting?

17 A. Myself and Mr. Jowdy first, and then at the end of
18 the meeting, which was a short meeting, his brother-in-law
19 Bill Najam arrived.

20 Q. How did that meeting come to take place?

21 A. By about February of 2007, through a series of
22 unfulfilled promises by Mr. Jowdy to fix our communication
23 problems which had occurred almost simultaneous with him
24 receiving the March 2006 \$125 million loan from Lehman
25 Brothers, I became very disenchanted with the lack of

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1 communication Mr. Jowdy had shown me and on behalf of the
2 all of the investors.

3 So after a series of e-mails and communications
4 in October 2006, when he promised to fix our communication
5 problems, which never happened, by about February, I had
6 lost about 15 of the \$2 million projection of sales on the
7 property which was a portion of how we were going to repay
8 Mr. Jowdy's loans to the Hawaiian investors.

9 At that point, in or about February 2007, I
10 tried to contact Mr. Jowdy a dozen times a day by text
11 message and by phone, and told him that this was very
12 serious now and his lack of communication was unacceptable
13 and we needed to have a face-to-face meeting.

14 And over a six week period of time, Mr. Jowdy
15 effectively refused to let me know where he was. I made
16 myself available in Cabo San Lucas on several occasions
17 which I thought would be an easy place for us to meet
18 considering we had a project going there.

19 And Mr. Jowdy finally, after about six weeks or
20 so, told me he would be back in Cabo San Lucas and could
21 have a meeting with me.

22 Q. Did you travel to Cabo San Lucas?

23 A. Yes, I did, for that meeting.

24 Q. And physically where did it take place? In his
25 office? In the villa?

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1 A. It took place in the living room of the house
2 Mr. Jowdy was renting at the time.

3 Q. Would you kindly describe for the Court and jury the
4 substance of the conversation you had with Ken Jowdy at
5 that point in time?

6 A. It was a conversation that lasted no more than two to
7 three minutes.

8 I told Mr. Jowdy that I had learned, at that
9 point in time, that he had another real estate project
10 going on in Texas, and he had effectively abandoned us for
11 the second time; first at Diamante Del Mar and now second
12 at Diamante Cabo San Lucas, and he was flying around the
13 country in the airplane that my friend and I had
14 purchased. He was flying to Costa Rica and throughout
15 Mexico looking for new projects to fund with the people
16 from Lehman Brothers, and effectively ignoring those of us
17 who invested upwards of \$25 million in cash with Mr. Jowdy
18 and also inclusive of loans that were outstanding.

19 At that point Mr. Jowdy, uncharacteristically to
20 what I had remembered in anything we dealt with before,
21 got very terse or agitated with me, and told me that he
22 effectively didn't need me or my investors any longer,
23 that he had Lehman Brothers to fund anything that he
24 needed, and that he was protected by the FBI, and so I
25 needed to either get on board with him or, frankly, get

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1 out of his way.

2 I was stunned by the conversation and I told him
3 we're just going to have to agree to disagree, that's an
4 inappropriate way for us to move forward in our business,
5 and he said, well, I've got some other place to be today,
6 and he actually left the meeting and walked upstairs to
7 his bedroom.

8 And that's when Mr. Najam entered the room from
9 the exterior and asked me if I understood what was going
10 on in the communication with Mr. Jowdy?

11 And I told him I was shocked. And he said,
12 well, that's how the rules are, so get used to it.

13 And at that point in time I told him I was
14 dismayed by it all and I didn't know what to do and I
15 think I left the house shortly thereafter.

16 Q. You were talking about the Texas project, correct?

17 A. Yes, sir.

18 Q. Did you come to learn who traveled with him to that
19 Texas project at some point in time and the mode of their
20 travel?

21 A. Yes.

22 During pretrial I was able to review all of the
23 flight logs for the Falcon aircraft, and on one occasion I
24 saw that Mr. Freeh and his wife had traveled to the Texas
25 project with Mr. Jowdy and I believe also with the

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1 gentleman from Lehman Brothers, Masoud Bahti on the Falcon
2 10 aircraft.

3 Q. What is or was your understanding of Mr. Freeh's
4 relationship with Ken Jowdy, just in terms of a
5 relationship, sir?

6 A. I was unaware of any relationship other than
7 Mr. Behnke and Mr. Freeh, from what Mr. Behnke told me,
8 were best of friends.

9 Q. Did there come a point in time that you learned that
10 Mr. Freeh and Mr. Jowdy had a different professional
11 relationship in some context?

12 A. Yes, sir, I did.

13 Q. In what way, sir?

14 A. In or about late 2008, when Mr. Constantine was still
15 negotiating and attempting to mediate a settlement between
16 Mr. Jowdy for all of his frauds and embezzlements,
17 Mr. Constantine was holding a conference call with
18 Mr. Jowdy, Mr. Najam--

19 Q. Let me stop you.

20 Were you present during that conference call?

21 A. Yes, sir, I was.

22 Q. What occurred?

23 A. Mr. Constantine had arranged, has he had on numerous
24 occasions, conference calls with Mr. Jowdy and Mr. Najam.

25 And on that particular phone call, in or about

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1 late 2008, I recall Tom Harvey, Mr. Jowdy's New York
2 attorney, representing that he was on the phone for the
3 call.

4 And then the next voice we heard was Mr. Freeh,
5 representing that he was on the phone call representing
6 Mr. Jowdy on the phone call as well, which I recall
7 specifically Mr. Constantine was stunned.

8 Q. Don't characterize Mr. Constantine's response. The
9 question was the nature of the conversation, okay?

10 We know, Mr. Kenner, that whatever efforts were
11 made for purposes of settling any number of disputes with
12 Ken Jowdy, including a mediation in California, they never
13 came to fruition, did they, sir?

14 A. Nothing ever resulted from those meetings or
15 mediations.

16 Q. To your knowledge, is Mr. Behnke still employed by
17 Mr. Jowdy?

18 A. To the best of my knowledge he is.

19 Q. To your knowledge, what, if any, employment does John
20 Kaiser have vis-à-vis his relationship with Ken Jowdy?

21 A. I believe John Kaiser is the director of vertical
22 construction at Diamante Cabo San Lucas as of about three
23 years ago.

24 Q. To your knowledge, what, if any, relationship does
25 Bryan Berard have with Ken Jowdy?

Kenner - Direct/Haley

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1 A. I believe Bryan Berard has been a sales associate in
2 different roles at Diamante Cabo San Lucas for the last
3 approximately three years.

4 THE COURT: Are you done with the Mr. Jowdy
5 questions?

6 MR. HALEY: Yes, your Honor, I am.

7 THE COURT: Why don't we take the break. We
8 will take the morning break.

9 Don't discuss the case.

10 (The jury is excused.)

11 (Recess taken.)

12 (After recess.)

13 THE CLERK: All rise.

14 THE COURT: Please be seated.

15 (The witness resumes the stand.)

16 THE COURT: Okay, let's bring in the jury.

17 MR. HALEY: Your Honor, I'm reaching the
18 conclusion, but I wanted to alert the Court I have a
19 number of documents that were previously marked for
20 identification.

21 It's not my intention to have my client
22 authenticate them all, but there will be any number of
23 them that I will be showing him near the conclusion.

24 I did provide the government, as well as
25 Mr. LaRusso, copies of all those documents so the Court is

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1 aware.

2 THE COURT: Okay.

3 THE CLERK: All rise.

4 (The jury is present.)

5 THE COURT: Please be seated.

6 Go ahead, Mr. Haley.

7 MR. HALEY: Thank you, Judge.

8 BY MR. HALEY:

9 Q. Mr. Kenner, at the conclusion of the government's
10 case, a number of charts were introduced into evidence
11 without objection and I'm going to refer to a select
12 number of those charts.

13 But would you kindly look at what you have in
14 front of you quickly to confirm that these are the charts
15 that were introduced into evidence by the government at
16 the conclusion of their case.

17 (Pause in proceedings.)

18 A. Yes, sir.

19 Q. Keeping them in sequence, Mr. Kenner, please take a
20 look at government chart number 1.

21 Do you see the transactions referenced on that
22 chart, sir?

23 A. Yes, sir, I do.

24 Q. To your knowledge, are those transfers, as reflected
25 on that chart, regarding monetary transactions, correct

Kenner - Direct/Haley

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1 and accurate?

2 A. Yes, I believe they are.

3 Q. Now, in March of 2005, we have, as reflected on the
4 chart, \$265,000 of Mr. Berard's line of credit ultimately
5 through Big Isle IV being paid into Fidelity National
6 Title; is that correct?

7 A. Through Big Isle VI.

8 Q. Excuse me. Correct.

9 It says for purchase of four Discovery Harbor
10 lots; is that true?

11 A. Yes, sir, it is.

12 Q. And what, if any, relationship did that purchase have
13 to the Hawaii land development project?

14 A. At the time, Big Isle VI was in the process of
15 acquiring two parcels. One was the Waikapuna parcels that
16 we had been in discussions with; and, second, John Kaiser
17 and Chris Manfredi were interested in acquiring a number
18 of smaller home sites that were in the local community
19 with the intent of building some very small homes on those
20 properties to test out importing different products to the
21 big island of Hawaii from the mainland, to see what kind
22 of lead time it would take before we got into the
23 construction of 8 to 12,000 square foot homes.

24 Q. We see on that chart, eight years later, June 14,
25 2013, we see payments going to you; is that correct?

Kenner - Direct/Haley

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1 A. On April 8 of 2013.

2 Yes, eight years later.

3 Q. Is that April or June?

4 A. April 2013.

5 Q. As relates to that transfer, sir, of 31,528.65, would
6 you describe the circumstances under which you caused that
7 transfer to be made to you and why we go from 265,000 to
8 31,528?

9 Tell us what happened?

10 A. Yes, sir.

11 The original four parcels that were purchased
12 for approximately \$265,000 and had gone through the real
13 estate crash that the rest of North America had, but in
14 that part of the big island of Hawaii, there were just
15 severe devastation to the property values, especially in
16 the small undeveloped home sites, so each of the home
17 sites actually sold for about \$9,000 at that time I
18 believe.

19 In or about the spring of 2013, I had been
20 running out of cash and continuing to pursue litigation
21 efforts against Mr. Jowdy in Mexico, and I had been
22 introduced to some new lawyers in Mexico at that time that
23 told me, after our first meeting that I met with them,
24 that they would need a retainer of about 25,000 to start
25 the project with me, the new litigation efforts against

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1 Mr. Jowdy in the summer of 2013, and then I would need
2 another approximately \$25,000 shortly thereafter.

3 And so at that point in time, some of the assets
4 that we still had that were under my control in Hawaii
5 were these four parcels that I had recently put for sale,
6 and I told the real estate agent to get them out and sell
7 them at whatever he thought fair market value was at that
8 time.

9 So he was able to effectuate a fairly quick
10 sale, and as a result I was able to get the \$31,528 and
11 then utilize it for legal funds in Mexico.

12 Q. Is that the reason why, eight years later, you didn't
13 send to Bryan Berard the 31,528.65 that now is traceable
14 to his line of credit that goes back to March 2005?

15 A. Well, Mr. Berard's line of credit, just like all the
16 other lines of credit, were capital contributions to
17 Little Isle IV pursuant to which they received their
18 equity ownership in Little Isle IV.

19 So the \$265,000 was a contribution to the Little
20 Isle IV partnership and eight years later when I
21 effectuated the sales of those four parcels, I utilized
22 those funds to hire more lawyers to continue to pursue Ken
23 Jowdy to try and retrieve the loans that he had stolen and
24 owed our project which were about \$19 million at that
25 point in time to 2013.

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1 Q. Did you believe, at that point in time, sir, that
2 your efforts in that regard were in the interest of your
3 hockey player clients?

4 A. Absolutely.

5 Q. Was that part of some artifice or scheme to defraud
6 Bryan Berard in particular?

7 A. No, sir.

8 Q. I note, Mr. Kenner, or we note that these payments
9 are made in, as indicated, certain incremental payments,
10 true?

11 A. Yes, sir.

12 Q. Within two on the same day and others shortly
13 thereafter.

14 Why didn't you send this attorney that \$25,000
15 retainer and why cash, what was that all about?

16 A. Well, by that point in time, I was running into a lot
17 of difficulties with my banks because I had been told by
18 several banks over the previous year that I had been under
19 investigation and I could not keep money in the accounts
20 and anyone that I was transferring money to, were having
21 problems on their end.

22 Since I was hiring some new attorneys that were
23 unknown to Mr. Jowdy, I decided that it was more important
24 that I took the cash out and paid the attorneys in cash so
25 there would be no trail to who the new attorneys were at

Kenner - Direct/Haley

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1 that point in time.

2 Q. Why increments of less than \$10,000?

3 A. You may or may not know, but if you withdraw \$10,000
4 or more, the bank has to fill out a special withdrawal
5 form and report that to the Federal Banking Commission.

6 Q. Was your decision in that regard to make payments in
7 that respect part and parcel of an artifice or scheme to
8 defraud your hockey player clients?

9 A. No, sir.

10 Q. By the way, \$877.00 went to a car payment; is that
11 correct?

12 A. Yes, sir.

13 Q. And do you have reason for doing so at that time,
14 sir?

15 A. I had a car payment due, but this wasn't the only
16 money I had in my possession.

17 Q. Well, how do you explain, sir, whereas the other cash
18 was going to a lawyer specifically hired by you to pursue
19 Jowdy, how do you explain the \$877.00 cash payment in
20 terms of the money you're entitled to or not entitled to,
21 just tell us, how do you explain it?

22 A. I had \$877.00 I took to the bank that day to make the
23 payment.

24 Q. If you would go to chart 2, sir, in your possession.

25 A. Yes, sir.

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1 Q. Are the financial transactions reflected on that
2 chart, to your personal knowledge, correct?

3 A. Yes, I believe they are.

4 Q. Rather than go through the same sequence of
5 questions, sir, well, with reference to the 16,261.38 that
6 ultimately you received on June 14, '13, would you
7 describe how we end up with what was originally sums of
8 money far greater than that and ultimately only 16,261.38
9 being traced.

10 A. In February of '05, pursuant to the same discussions
11 I had with John Kaiser and Chris Manfredi, we purchased a
12 fifth small home site in Discovery Harbor for \$86,000.

13 About eight years later, with the same financial
14 issues at stake, to put together some more cash for the
15 new Mexican legal counsel, I was assisting in new
16 litigation filings against Mr. Jowdy in Mexico, I asked
17 the same real estate agent in Hawaii to try and sell that
18 fifth lot, which in fact he did, and the residual proceeds
19 of 16,261 were transferred to me in June of 2013.

20 Subsequent to that, over the next few days, I
21 made two cash withdrawals of that amount for the purpose
22 of delivering them to my new attorneys.

23 Q. If we can go to chart 3, Mr. Kenner.

24 A. Yes.

25 Q. The financial transactions reflected on 3, to your

Kenner - Direct/Haley

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1 knowledge, true and correct?

2 A. Yes, sir, I believe they are.

3 Q. Why don't you just tell us the purpose of those
4 transactions?

5 A. Yes.

6 Q. Of your own personal knowledge.

7 A. Sure.

8 On or about July 7, 2005, I had utilized funds
9 from Little Isle IV to which apparently originated from
10 Michael Peca's line of credit as a capital contribution of
11 Little Isle IV.

12 I deposited it in the title guarantee escrow in
13 order to put another parcel of land in July 2005 under a
14 purchase and sale agreement that would be helpful I
15 believe to access the Waikapuna parcel which was a big
16 issue for us at the time.

17 About two-and-a-half years later, after the
18 close of the Lehman escrow, in December 2007 I had started
19 to incur legal fees and there were also some outstanding
20 expenses due to me from the Hawaii partnership.

21 So at the close of that escrow, when the parcel
22 was not acquired by the joint venture partnership, I
23 distributed the \$25,000 back to myself to cover expenses
24 that were outstanding at the time.

25 Q. When you say cover expenses, Mr. Kenner, the books

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1 and records that were maintained by Little Isle IV and/or
2 the other LLCs that tracked those expenses?

3 A. Not specifically that I recall, but the expenses
4 would have been in connection with the five or \$600,000
5 that I had loaned out to the Hawaii partners previous to
6 the closing.

7 And, in addition, the company still owed me
8 about \$300,000 at that time on the environmental
9 agreement, the environmental indemnity agreement, and in
10 addition I started to incur legal fees at that point
11 pursuant to the loans that were outstanding with Mr. Jowdy
12 on behalf of the company.

13 Q. By the way, and I hope I don't belabor the point, who
14 was maintaining books and records for you during this
15 period of time?

16 A. Up until December of 2007, I was the custodian of all
17 of the banking records for Little Isle and for the rest of
18 the entities related to Little Isle including Na'alehu
19 Ventures.

20 As of December 31st, 2007, John Kaiser became
21 the manager of the Na'alehu Ventures and became the
22 ultimate custodian at that point.

23 Q. Kristie Myrick was employed by you for a period of
24 time?

25 A. Yes, sir, from approximately April of 2003 until

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1 approximately March 1st of 2007.

2 Q. In what capacity was she employed by you?

3 A. She was an office manager for my sports and
4 entertainment practice, and from time-to-time she would
5 also assist as an employee of the efforts in Hawaii and
6 Mexico, in addition to my other assistant at the time.

7 Q. What, if any, role did she play in maintaining, let's
8 say, expense records, business records associated with
9 those entities during the period of time she was employed
10 by you?

11 A. She was one of the two girls, but the one who was
12 specifically in charge of keeping all of my books and
13 records on our corporate server up until the time of her
14 termination in or about January of 2007, and then all of
15 the resulting books and records, in addition to tens of
16 thousands of other documents, were kept by her and not
17 returned to me upon her termination.

18 Q. To your knowledge, where are those books and records
19 if they still exist today?

20 A. If they still exist, they would still be on that
21 corporate server that Kristie Myrick and her attorney
22 Michael Meeks possess.

23 Q. Michael Meeks.

24 To your knowledge, did Michael Meeks represent
25 anyone else in connection with the litigation that's been

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1 referred to in this proceeding, including the arbitration?

2 A. Yes, sir.

3 Michael Meeks represented Kristie Myrick, he
4 represented Owen Nolan, he represented Joe Juneau, and he
5 represented Ethan Moreau.

6 Q. By the way, the picture of Michael Peca on chart
7 number 3, is that a fair and accurate picture of Michael?

8 A. I believe it is.

9 Q. Now, skipping chart 4 and let's go to chart 5.

10 A. Yes, sir.

11 Q. Mr. Kenner, when I skipped chart 4, to the best of
12 your knowledge, has your testimony up to this point in
13 time been relevant and material to the transactions as set
14 forth in the chart I skipped; yes or no?

15 A. I'm not sure I understood the question. I apologize.

16 Q. I'm not sure I understood the question.

17 The chart I skipped, sir, it reflects various
18 financial transactions; is that correct?

19 A. Yes, sir, it does.

20 Q. It simply relates, sir, does it not, to use of lines
21 of credit to purchase title for Honu'apo?

22 A. That's correct.

23 These were the funds that were still required to
24 close on or about December 28, 2004, for the 1500 acre
25 parcel of Honu'apo.

Kenner - Direct/Haley

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1 Q. Looking at chart 4 --

2 THE COURT: You mean 5.

3 MR. HALEY: Excuse me. 5.

4 BY MR. HALEY:

5 Q. Does that chart accurately reflect the financial
6 transactions as set forth in the chart?

7 A. To the best of my recollection, I believe it's
8 accurate.

9 Q. As we go down to the 71905, \$1.5 million line to that
10 corporate entity?

11 A. Propiedades Dom.

12 Q. Thank you for pronouncing that.

13 At that point in time, 2005, who was the manager
14 or owner of that corporate entity?

15 A. Ken Jowdy.

16 Q. With reference to Baja Development Corp., who was the
17 owner or managing member of that corporation?

18 A. Ken Jowdy.

19 Q. The money that flows ultimately to CMG, Tommy
20 Constantine, 7/21/05, 7/22/05, \$650,000, and as we see on
21 the right side of the chart, it ends up in an account
22 controlled by Tommy Constantine, CMG; is that correct?

23 A. Yes, sir, I see that.

24 Q. That is Constantine Management Group, true?

25 A. Yes.

Kenner - Direct/Haley

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1 Q. And the basis for that payment to him in that amount
2 at that time, sir?

3 A. I believe it would have been the 2005 funding
4 consulting agreement between Constantine Management Group
5 and the Hawaiian partners.

6 Q. From that point on, when he received that money that
7 went to him pursuant to that contract, it reflects he then
8 wrote out checks for the purchase of the Palms Place
9 Condos?

10 A. I see that on the chart.

11 Q. Were you part and parcel of that financial transfer
12 in some sense?

13 A. No, sir, I was not.

14 Q. Did you even know that he decided to take his 650,000
15 and then purchase the Palms Place Condos?

16 A. I was only aware that Mr. Constantine was in the
17 process of purchasing a number of condominiums at the
18 Palms Place, but not that specific transaction.

19 Q. Mr. Kenner, I'm going to skip chart 6. I'm going to
20 skip chart 7.

21 Chart 8, sir, is the Sag Harbor transfers; do
22 you see that?

23 A. Yes, sir, I do.

24 Q. I believe, sir, just a short while ago you testified
25 to the transfers and purposes of those transfers; is that

Kenner - Direct/Haley

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1 correct?

2 A. Yes.

3 Q. I'm going to skip that chart as well, sir.

4 As relates to chart 9, Mr. Kenner, does that
5 chart, to your knowledge, accurately reflect the financial
6 transactions as set forth on the face of the chart?

7 A. Yes.

8 Those transactions are a portion of the
9 transactions that occurred on that bank statement.

10 Q. As relates to the Kaiser to Ula Makika to the monies
11 going out to CMG Constantine as reflected on the top line,
12 would you simply explain those transactions to your
13 knowledge?

14 A. The payments, I believe in December '06 through
15 February '07, were pursuant to a funding consulting
16 agreement or a loan agreement Mr. Constantine had
17 requested at the time of the Lehman Brothers closing in
18 August of 2006 related to the Waikapuna parcel and the
19 future release of the 123.9 acre Urban Expansion parcel.

20 Q. As relates then to the vertical access axis, would
21 you explain those payments?

22 A. Yes.

23 Once the \$380,000 loan was repaid by Mr. Kaiser
24 to Ula Makika, about six or seven weeks later \$200,000 I
25 distributed to me personally pursuant to the environmental

Kenner - Direct/Haley

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1 indemnity agreement which I think was about a month or
2 month-and-a-half late any ways as far as the payment went,
3 and then subsequent to that I had made a down payment on
4 the California beach house with those funds.

5 Q. Chart 10, Mr. Kenner.

6 A. Yes, sir.

7 Q. To avoid repetition of your testimony, chart 10
8 references -- first of all, are the financial transactions
9 set forth on chart 10 correct, to your knowledge?

10 A. Yes, to the best of my knowledge.

11 Q. And reflects \$100,000 from Mr. Peca going to
12 Constantine Management Group; is that correct?

13 A. Yes, sir.

14 Q. And then money being sent to you; is that correct?

15 A. Yes, sir, on the same day.

16 Q. Is that chart relevant to your testimony concerning
17 ownership interest being conveyed by Mr. Constantine to
18 your various hockey player clients in return for money
19 they sent to his personal account, CMG Management?

20 A. Yes.

21 I believe this transaction Mr. Peca purchased a
22 portion of Mr. Constantine's private Eufora stock, just a
23 small portion of it.

24 And Mr. Constantine, on the 7th of April, was
25 repaying \$100,000 advance I had made to him five days

Kenner - Direct/Haley

4499

1 earlier I believe on April 2 of 2008.

2 (Continued on next page.)

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Kenner - Direct/Haley

4500

1 DIRECT EXAMINATION

2 BY MR. HALEY:

3 Q. So what, if anything, did your client get for that
4 100,000 payment that Mr. Constantine then in turn paid you
5 100,000?

6 A. Mr. Peca received, I believe, .5 percent ownership in
7 Eufora at the time, which I believe was valued at \$20
8 million as a corporate entity.

9 Q. Chart 11, Mr. Kenner, that chart has some relevance
10 to you?

11 A. Yes, sir. April 24th, same transaction as the
12 Peca's. Mr. Nash, on April 24th of 2008, had purchased a
13 .5 percent interest from Mr. Constantine's private Eufora
14 stock, and as a result of that transaction, Mr.
15 Constantine was able to repay me, on April 28, 2008, a
16 portion of the \$25,000 I had advanced to him a week or two
17 earlier.

18 Q. Now, we saw some bank records -- withdrawn.

19 Without being repetitive, Mr. Kenner, this chart
20 shows money going in to CMG Management to Mr. Constantine,
21 and then him using his account at CMG Management to send
22 money to Playboy in the amount of 28,000. In return for
23 Mr. Sydor's payment to CMG, in return for Mr. Sydor's
24 payment that day to Tommy Constantine as deposited in
25 Tommy Constantine's personal account, what, if any, value

Kenner - Direct/Haley

4501

1 did Mr. Sydor receive for that \$50,000 payment for Mr.
2 Constantine?

3 A. From what I receive on Eufora's books and records,
4 Mr. Sydor received --

5 MR. MISKIEWICZ: Objection.

6 THE COURT: Sustained.

7 MR. HALEY: Thank you.

8 Q. Now, from what you have seen on their books and
9 records at the time the transfer was made, what was your
10 understanding based upon conversations you had with Tommy
11 Constantine, as well as your clients, as to what, if any,
12 value your client was going to receive in return for that
13 \$50,000 payment for Mr. Constantine?

14 A. I apologize. Mr. Sydor was receiving a .25 percent
15 interest in Eufora directly from Mr. Constantine's
16 holdings, his private ownership in Eufora for that
17 \$50,000.

18 Q. Sir, taking a look at chart number 13, do you see
19 that chart?

20 A. Yes, sir, I do.

21 Q. To your knowledge and understanding, when Mr. Ranford
22 conveyed 200,000 to CMG, account controlled and operated
23 by Constantine management on that date, what, if any,
24 value did he receive for his \$200,000 contribution?

25 A. At that point, Mr. Ranford received a 1 percent

Kenner - Direct/Haley

4502

1 interest in Eufora from Mr. Constantine's private equity
2 holdings, private ownership in Eufora.

3 Q. Other than the \$38,000 that went out to you by this
4 chart on 7/11/08, did you know that those other monies
5 were disbursed from Mr. Constantine's account thereafter?

6 A. No, I was unaware of any of the other transfers,
7 other than Mr. Constantine's \$38,000 repayment to me.

8 Q. Repayment for what?

9 A. Just funds that I had advanced him upon his request
10 prior to that transaction date.

11 Q. How common was that during this period of time where
12 you would advance funds to Mr. Constantine or he would
13 advance funds to you? How would you characterize that?

14 A. It happened fairly regularly.

15 Q. Did Mr. Constantine, from your perspective, at times
16 seem to be in need of cash on a short-term basis?

17 A. On a regular basis he did.

18 Q. Well, of your personal knowledge, sir, did you have
19 an understanding during the period of time that monies
20 were being loaned to Mr. Kaiser as to his net worth?

21 A. Mr. Constantine's?

22 Q. Excuse me, Mr. Constantine.

23 A. Yes; I believe he was a very wealthy individual.

24 Q. He is asking you for money, is he not?

25 A. Yes, sir.

Kenner - Direct/Haley

4503

1 Q. How did that strike you?

2 A. Well, I think in a common sense it would seem
3 strange, other than the fact that I knew, from what I had
4 seen, Mr. Constantine owned a lot of illiquid assets,
5 whether it be his home property, or his ownership in
6 Eufora, or his ownership in the Avalon hangars, his
7 helicopters when I first met him, so the illiquid assets
8 made sense. He was a wealthy individual, but from time to
9 time he would be short on cash, so he would approach me,
10 ask if I could lend him cash on a short-term basis. When
11 it was available, I accommodated.

12 Q. Mr. Kenner, you say illiquid assets. That's like my
13 home being worth X amount, yet not being able to
14 necessarily grab the cash unless I sell my home. I
15 apologize. What do you mean by illiquid assets?

16 A. Example of a home is the best example, if you had a
17 million dollar home with no mortgage on it, you couldn't
18 use that to go buy groceries that day, so your home value
19 would be illiquid or not liquid, not accessible.

20 Q. Very quickly, Mr. Kenner, chart 14, I know there has
21 been testimony with reference to this, but so the jury can
22 acclimate -- chart, \$1,481,127, do you see that?

23 A. Yes, sir, I do.

24 Q. What did that represent when Mr. Gaarn paid you
25 \$81,127 on 12/31/08 after that same day he received

Kenner - Direct/Haley

4504

1 through Eufora the sum of 100,000, which previously had
2 been sent to Eufora by Glen Murray on 12/29/08?

3 A. Glen Murray had purchased some of Mr. Gaarn's private
4 holdings through a company Mr. Gaarn owned called Standard
5 Ventures. And when Mr. Gaarn received the proceeds from
6 the sale of his private ownership in Eufora, he began to
7 repay me a portion of the \$150,000, plus advances, loans I
8 made to him over the previous two years, so the \$81,127
9 was calculation he and I had done to repay \$70,000 of
10 principal and attach \$11,127 of interest that was due on
11 the loan at that time.

12 Q. Chart 15, sir.

13 A. Yes, sir.

14 Q. Now, with reference to this chart, does it accurately
15 reflect the financial transactions involving the various
16 individuals and dates as set forth on that chart?

17 A. I believe from what I have seen, this appears
18 accurate.

19 Q. We see, do we not, money going into Mr. Gaarn from
20 Eufora having previously been transferred by Mr. Ranford
21 and Greg DeVries into Eufora, but I want you to take a
22 look at the vertical axis, we see Gaarn and \$30,000 going
23 out 12/09 to Kaiser, do you see that?

24 A. Yes, sir, I do.

25 Q. Then we see a horizontal line from Kaiser to Standard

Kenner - Direct/Haley

4505

1 Advisors, Mr. Kenner, do you see that?

2 A. Yes, sir, I do.

3 Q. Starting with the vertical axis, Gaarn 2/12/09,
4 30,000 then the horizontal axis, will you explain that to
5 us?

6 A. Yes. In or about February of 2009, Mr. Kaiser and I
7 had a renovation project in Paradise Valley, Arizona that
8 we discussed during this trial, and Mr. Kaiser was in need
9 of money that he needed to contribute to the Paradise
10 Valley property, and since he had been paid back in full
11 by me with respect to the California beach project at that
12 time, and any other outstanding transactions we had, in
13 order to keep track of additional money that Mr. Kaiser
14 was borrowing, I asked that Mr. Gaarn transfer the money
15 to Mr. Kaiser as a loan, and then Mr. Kaiser forwarded
16 that money to me so I could take care of expenses I
17 continued to front and pay for on the Paradise Valley,
18 Arizona renovation project.

19 MR. HALEY: Quick moment, Judge.

20 Q. Going to Chart 16, does that chart, to your
21 knowledge, accurately reflect the financial transactions
22 as depicted in that chart?

23 A. Yes, I believe it does.

24 Q. And with reference, sir, to the, starting with the
25 Gaarn block and then the axis, we see the 2/25/09,

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1 \$40,000, 40,300 going to Kaiser. Do you see that?

2 A. Yes, I do.

3 Q. Then we see Kaiser the following day transferring
4 \$40,300 to you. See that?

5 A. Yes, sir, I do.

6 Q. Can you explain that transaction?

7 A. That transaction is identical to what we did on
8 February 12 of '09. On the previous slide, chart 15, when
9 Mr. Kaiser received \$30,000 from Mr. Gaarn, then forwarded
10 the money to me to track Mr. Kaiser's interest in the
11 expenses related to the Arizona renovation project.

12 So on February 25th, I had asked Mr. Gaarn if he
13 would do the same thing for Mr. Kaiser. There were bills
14 totalling approximately \$40,300, so I asked Mr. Gaarn for
15 that for Mr. Kaiser, so he could forward it to me for
16 tracking purposes.

17 As you can see, on the same day, February 25th
18 of 2009, Mr. Gaarn was still in the process of, I believe,
19 repaying me some of the initial loans I had made to him.
20 On that same day, I asked him to forward \$30,000 to me
21 directly.

22 Q. Now, that \$40,300 that we were referring to that says
23 occurred on February 26, 2009, see what I'm referring to?

24 A. Yes, sir, I do.

25 Q. I'm going to read to you Count Three of the

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1 indictment that alleges wire fraud, and Count Three reads
2 as follows:

3 February 26, 2009, \$40,300 wire transfer from
4 John Doe's account at Commerce Bank in the Eastern
5 District of New York to an account in the name of Kenner
6 at Bank of America in Scottsdale, Arizona.

7 Do you remember that count in the indictment?

8 A. Yes, I do.

9 Q. Who do you know John Doe 10 to be these days, or do
10 you not know?

11 A. I don't know. I don't want to guess.

12 Q. Well, does the name Timothy Gaarn ring a bell?

13 A. Yes, sir, it does.

14 Q. By the way, did you ever conspire with Timothy Gaarn
15 to defraud your clients, sir?

16 A. No, sir, I did not.

17 Q. With reference, sir, to that transaction, February
18 26, 2009, \$40,300 wire transfer as reflected on government
19 chart number 16, when that occurred, was that part of a
20 scheme or artifice to defraud your clients?

21 A. No, sir.

22 Q. I'm going to skip chart 17. Skip chart 18, to not
23 belabor the record. I only have two charts left.

24 I'm going to show you chart number 19. Do you
25 recognize that financial transaction depicted on that

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1 chart?

2 A. Yes, I do.

3 Q. Do they accurately reflect the transactions,
4 financial transactions, as depicted on the chart?

5 A. I believe they do.

6 Q. Can you explain to us, sir, as set forth on that
7 chart, the \$85,000 that's transferred to you, then the
8 expenses that thereafter follow that payment after you
9 receive that, what that was all about?

10 A. After Mr. Gaarn had sold .5 percent in Eufora to Mr.
11 Ranford, I had asked Mr. Gaarn at that time if I could
12 borrow some funds now that I believe he had fully repaid
13 me the original loan. This may have been the second or
14 third occurrence I asked Mr. Gaarn if I could borrow some
15 of his funds. He had no problem with it. We were working
16 on other deals at the time together. And he knew I would
17 be good for the money.

18 On May 20, 2009, Mr. Gaarn wire transferred me
19 \$85,000, and actually, a few days later -- that appears to
20 be little more than two weeks after Mr. Gaarn had sold his
21 stock to Mr. Ranford. A few days later, Mr. Kaiser, I
22 recall, needed some funds to pay down some of his credit
23 card bills and personal expenses. He actually borrowed
24 another \$25,000 from me May 22, 2009. Then I made a
25 series of personal payments to pay my American Express

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1 bill and my Citi MasterCard. Many of those expenses were
2 related to the Paradise Valley home we were renovating.
3 Then I had a couple of automobile payments I took care of.

4 Q. I truly hope I'm not repetitive. As relates to the
5 100,000 transfer on May 4, '09 from William Ranford, to
6 your knowledge, was he aware of that payment?

7 A. Yes, sir, he was.

8 Q. To your knowledge, is there a document that you saw
9 that at least advises him from a financial institution of
10 the transfer of his monies on that day?

11 A. Yes, sir; Charles Schwab transfer confirmation sent
12 to his home in Bellingham, Washington.

13 Q. Finally, sir, we have government chart number 20.

14 What, if anything, do you know of your own
15 personal knowledge of the transactions reflected in that
16 chart, sir?

17 A. Nothing at the time.

18 Q. Well, Count Five of the indictment charges both you
19 and Tommy Constantine with wire fraud and it reads:

20 December 7, 2009, 150,000 wire transfer from
21 John Doe 11's account, that's Mr. Privitello, at Fidelity
22 Investments in the Eastern District of New York to an
23 account in First Century Bank in Los Angeles, California.

24 How do you respond to that accusation in the
25 indictment with respect to your activity?

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1 A. I had no knowledge of that transaction whatsoever.

2 Q. Count Six also charges you and Tommy Constantine with
3 wire fraud, reads:

4 December 7, 2009, says in the indictment, 50,000
5 wire transfer from John Doe's account, Mr. Privitello, at
6 Citizens Bank in the Eastern District of New York to an
7 account at First Century Bank in Los Angeles, California.

8 What, if anything, do you know as relates to
9 that transfer, and what was your involvement at all in
10 that transfer?

11 A. I knew nothing about it and had no involvement in
12 that transaction whatsoever.

13 Q. Mr. Kenner, I'm going to read to you paragraph 28 of
14 the indictment which falls under the Led Better
15 allegations, and it reads:

16 On or about the dates set forth below, within
17 the Eastern District of New York and elsewhere, the
18 defendant Phillip A. Kenner, also known as Philip A.
19 Kenner, did knowingly and intentionally devise a scheme
20 and artifice to defraud Bryan Berard, substituting John
21 Doe and Michael Peca, and to obtain money and property
22 from them by means of false and fraudulent pretenses,
23 representations and promises, and for the purpose of
24 executing such scheme and artifice, did transmit and cause
25 to be transmitted writings, signs, signals, pictures and

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1 sounds by means of wire communication in interstate
2 foreign commerce, as set forth below.

3 Count Seven. November 20, 2008, \$43,000 wire
4 transfer from Kenner's account at Wells Fargo in
5 Scottsdale, Arizona to Ula Makika account at Northern
6 Trust Bank in Scottsdale, Arizona.

7 Do you recall that allegation in the indictment?

8 A. Yes, I do.

9 Q. Can you tell us what happened as relates to that
10 allegation, what it means to your personal knowledge?

11 A. The \$43,000 wire transfer was a portion of the six
12 months of \$267,000 that I personally paid on behalf of the
13 lines of credit at Northern Trust Bank to keep them
14 current and out of default while I was trying to complete
15 the line of credit transfers to Bank of America at that
16 time.

17 Q. Count Eight reads:

18 December 31, 2008, \$35,000 wire transfer from
19 Kenner's account at Wells Fargo Bank in Scottsdale,
20 Arizona to the Little Isle IV account in Northern Trust,
21 Scottsdale, Arizona.

22 As relates to that allegation against you, sir,
23 kindly describe to us the circumstances and reasons for
24 that transfer?

25 A. That \$35,000 was wired from my personal bank to the

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1 Little Isle IV at Northern Trust Bank to make another
2 payment on all of the lines of credit to keep that current
3 and out of default as part and parcel of the \$267,000 of
4 payments I made over that six-month period of time, while
5 I was attempting to transfer the lines of credit from
6 Northern Trust Bank to Bank of America and their
7 underlying collateral accounts.

8 MR. HALEY: Your Honor, I have a number of
9 documents I'm going to be showing Mr. Kenner for purposes
10 of identification, and by way of proffer, what I would
11 ultimately offer in evidence, once authenticated, in order
12 to do so, in an effort to move the matter along, I thought
13 I would stand next to my client and go exhibit by exhibit.

14 THE COURT: That's fine.

15 Q. Mr. Kenner, no particular sequence as relates to
16 these exhibits. I want you to know the exhibit number
17 doesn't necessarily follow sequentially for your purposes
18 and purposes of the jury's understanding. Okay?

19 A. Yes, sir.

20 Q. I want you to take a look at a document previously
21 marked Kenner Exhibit 55 for identification. Can you tell
22 us what that is?

23 A. Kenner Exhibit 55 appears to be the Standard
24 Advisors, Inc. agreement with Owen Nolan signed on April
25 3, 2003.

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1 Q. Is that a true and accurate copy of the Standard
2 Advisors agreement executed between yourself and Owen
3 Nolan?

4 A. Yes, sir, it is.

5 Q. I want you to take a look at Kenner Exhibit 38. Just
6 tell us what that is.

7 A. Kenner Exhibit 38 is a July 12, 2006 e-mail that I
8 sent to Chris Manfredi and John Kaiser, subject:
9 Representations and warranties. This was the section out
10 of the joint venture closing agreement that both Mr.
11 Manfredi and Mr. Kaiser needed to approve in order to move
12 forward with the joint venture with Lehman Brothers and
13 Windwalker. This is the e-mail that contains the language
14 we read out of the seven inches of binders stating that --

15 Q. Not what it states. Tell me what it is.

16 A. That's it.

17 Q. Is this a true and accurate copy of that e-mail you
18 sent to John Kaiser?

19 A. And Chris Manfredi, yes.

20 Q. I want you to take a look at a document marked Kenner
21 Exhibit 37. What is that, sir?

22 A. Kenner Exhibit 37 is a handwritten document that John
23 Kaiser had made a replication of a similar document that
24 was in my handwriting, and it was faxed by John Kaiser on
25 December 6th of 2009.

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1 Q. Do you recognize -- would you describe to us the
2 circumstances, to your knowledge, under which Kenner
3 Exhibit 37 came to be created?

4 A. On or about the first and second week of December
5 2009, John Kaiser was at my residence in Arizona working
6 on our renovation project, and he was setting up a meeting
7 with Tommy Constantine to discuss an equity stake in
8 Eufora that Mr. Constantine had promised to both Mr.
9 Kaiser and myself with respect to advances that had been
10 made to him.

11 Mr. Kaiser had asked me if there was a list of
12 all the transfers, and I had previously made a handwritten
13 list as a summation of all the bank records and transfers
14 that had gone on with Mr. Constantine previously. And on
15 that document, Mr. Kaiser also noted the -- his
16 acknowledgment of the three consulting, funding consulting
17 deal that Mr. Constantine received from Little Isle IV,
18 Ula Makika and Na'Alehu Ventures.

19 Q. Where is that reflected on the document, just in what
20 portion?

21 A. On the bottom right corner, designated under the word
22 Hawaii, which Mr. Kaiser actually transcribed in his own
23 pen from, if I recall correctly, my representation that
24 those three were related to Little Isle IV, Ula Makika and
25 Na'Alehu Ventures.

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1 Q. Is this document a complete and accurate copy of the
2 notes that you saw him transcribe in his hand from your
3 meeting and notes with him?

4 A. Yes; I believe it is.

5 Q. Kindly take a look at Kenner Exhibit 70. Do you
6 recognize that document?

7 A. Yes, sir, I do.

8 Q. What is it?

9 A. Kenner Exhibit 70 is a July 21, 2006 letter that was
10 written by Larry Markowitz, Bill Niger with my assistance
11 that went out to the members of Little Isle IV, alerting
12 them to the status of the pending joint venture agreement
13 between our entity and Hawaii, Little Isle IV and Alan
14 Worden and his company Windwalker with respect to the \$105
15 million transaction at Lehman Brothers.

16 It accompanies on the last page a response form
17 that Lehman Brothers and Windwalker required each of the
18 members of Little Isle IV sign, which acknowledges that
19 they have received the limited liability company agreement
20 for Na'Alehu Ventures limited liability proposed operating
21 agreement for Windwalker holdings, and that they had been
22 given the opportunity to go get independent consultation
23 for legal, for tax and other matters with respect to
24 independent investigations of this transaction prior to
25 signing.

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1 Q. As relates to this particular document, does it bear
2 anyone's signature?

3 A. Yes, this is a document that was signed by Darryl
4 Sydor.

5 Q. Thank you, sir.

6 Tell us what Kenner Exhibit 32 is.

7 A. Kenner Exhibit 32 was the Na'Alehu management members
8 -- transfer of the managing members' status of Na'Alehu
9 Management LLC, the managing member of Na'Alehu Ventures
10 2006 LLC, from myself to John Kaiser on December 31, 2007,
11 pursuant to one of the clauses in the equity transfer
12 agreement signed between Mr. Kaiser and I prior to the
13 Lehman Brothers closing in August of 2006.

14 Q. Is this a complete and accurate copy of that
15 document, sir?

16 A. Yes, sir, it is.

17 Q. Your signature appears on that document, is that
18 correct? Yes or no?

19 A. Yes.

20 Q. Does John Kaiser's signature appear on that document,
21 also?

22 A. Yes, sir.

23 Q. Do you see how, at least on that document, how he
24 writes his "O" in the middle of his name?

25 A. Yes, I do.

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1 Q. Kindly take a look at Kenner Exhibit 31. Do you
2 recognize this document?

3 A. Yes, sir, I do.

4 Q. What is it?

5 A. Kenner Exhibit 31 is a loan agreement that was
6 created by Mr. Constantine on or about July 21, 2006 as an
7 agreement between Constantine Management Group and
8 Na'Alehu Ventures 2006, with respect to advanced fees that
9 were paid to Mr. Constantine in the event that a portion
10 of the settlement agreement between Urban Expansion and
11 Lehman Brothers and Windwalker did not complete itself
12 properly.

13 Q. Is that a complete and accurate copy of the loan
14 agreement?

15 A. Yes, sir, I believe it is.

16 Q. To your knowledge, is that John Kaiser's signature on
17 that document?

18 A. Yes, it is.

19 Q. Kindly take a look at Kenner Exhibit 29. What is
20 this document, sir?

21 A. Kenner Exhibit 29 is an equity transfer agreement,
22 dated July 26, 2006, between myself and John Kaiser with
23 respect to funds that were distributed at the August 2006
24 closing of the Lehman Brothers funding by which Mr. Kaiser
25 gave me a loan of \$360,000 from his residual properties at

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1 the time of the closing to be paid directly to an entity
2 of my request.

3 It also, in Section 4, gave Mr. Kaiser the right
4 to become the managing member as a result of this
5 agreement of Na'Alehu management 12 months from the date
6 of the JV closing at his sole discretion. He didn't
7 believe future milestone payments of \$4 million were
8 progressing pursuant to a payout and the intentions of the
9 joint venture he agreed to.

10 Q. Is that a complete and accurate copy of the equity
11 transfer agreement, sir?

12 A. Yes, sir, it is.

13 Q. Who signed on the line, John R. Kaiser?

14 A. John Kaiser did.

15 Q. Kindly look at Kenner Exhibit 30. Do you recognize
16 that, document?

17 A. Yes, sir, I do.

18 Q. What is it?

19 A. Kenner Exhibit 30 is an environmental indemnity
20 agreement I discussed earlier dated August 5, 2006 between
21 Na'Alehu Ventures and myself as the guarantor, for any
22 environmental issues that may have arisen with respect to
23 post-closing activities on the properties in Hawaii.

24 Q. Is that the environmental indemnity agreement that
25 you have referenced in your testimony in connection with

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1 payments that ultimately came your way by way of that
2 agreement?

3 A. Yes, sir. The 200,000 that was paid in or about
4 December 18, 2006.

5 Q. Is this document an accurate and complete photocopy
6 of the environmental agreement?

7 A. Yes, it is.

8 Q. I notice there is a circle of initials on the faded
9 three pages of the document?

10 A. Yes, sir.

11 Q. Whose circle -- whose initials are those?

12 A. They are John Kaiser's initials on page 1, page 2 and
13 page 3 of the agreement, not on page 4. But that's the
14 page that John Kaiser signs.

15 Q. How did his initials come to appear on this document?

16 A. He initialed each page on the same day I signed the
17 document.

18 Q. Now, there is in evidence a funding consulting
19 agreement that the government introduced. We talked about
20 that at great length; have we not?

21 A. I have seen two of them.

22 Q. Do his initials appear on each of those pages, if you
23 recall?

24 A. I don't recall.

25 Q. What is this particular -- what is this document,

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1 Kenner Exhibit 25?

2 A. Kenner Exhibit 25 is the 2004 bylaws for Little Isle
3 IV LLC that replaced the original December of 2003 bylaws
4 for Little Isle IV. This was signed by me as the managing
5 member of the Little Isle IV.

6 Q. You testified previously to an operating agreement,
7 one of which allowed a loan to be paid out of the LLC. Do
8 you recall that testimony?

9 A. Yes, sir.

10 Q. Is that the document you were referring to?

11 A. I don't believe that this is the document I'm
12 referring to.

13 Q. Let's go through the rest of it.

14 Do you know in what context or sequence -- do
15 you know in what context this document came to be created?

16 A. I believe this document was created after the closing
17 of the 258 parcel, as we acquired additional investors
18 into the LLC of Little Isle IV, so this was the second
19 bylaws that were created for Little Isle IV, as our
20 membership grew from five individuals to somewhere in the
21 neighborhood of 10 to 12 individuals.

22 Q. But the 2004 operating agreement that gave you
23 authority to lend, have you seen that in this proceeding?

24 A. I don't think I have seen it introduced in evidence
25 yet, but I have seen it in the discovery.

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1 Q. Kenner Exhibit 9 we have seen before; have we not
2 sir?

3 A. Yes, sir, we have.

4 Q. For purposes of the record, what is Kenner Exhibit
5 19?

6 A. Kenner Exhibit 19 is the August 2006 Na'Alehu
7 Ventures LLC bank record from Northern Trust Bank, which
8 incorporates the deposit of \$6,834,287.29 from the escrow
9 account at the closing of the Lehman Brothers 105 million
10 with us and Windwalker.

11 Q. To your knowledge, has this document previously been
12 introduced into evidence as a government exhibit?

13 A. Yes, I believe I have seen that before.

14 Q. Kenner Exhibit 16, what is this? What is that
15 document?

16 A. I believe this Kenner Exhibit 16 is the same document
17 that we saw earlier, a letter that was written by Larry
18 Markowitz and Bill Niger, July 21, 2006, with my
19 assistance to all the members of Little Isle IV. I
20 believe we saw the one that had Darryl Sydor's signature
21 on it originally and not being 100 percent certain that
22 this includes the signatures of the Little Isle IV members
23 in their entirety that was sent prior to the closing.

24 Q. Up to this point in time, you have had some exhibits
25 introduced that contain the signature of a particular

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1 individual on that document as a result of their
2 testimony, but this is the document that bears, to your
3 knowledge, everyone's signature?

4 A. Yes, it does. And I see including Mr. Joe Juneau's
5 signature on the response form.

6 Q. At some point in time, did you have in your
7 possession before your arrest this document that contains
8 everyone's signature?

9 A. Yes, sir, I believe this was the one.

10 Q. Is Kenner Exhibit 16 a complete and accurate copy of
11 the July 21, 2006 letter as you described it to the
12 members of Little Isle IV LLC in which each response form
13 is attached?

14 A. Yes, sir, it is.

15 Q. Tell us what Kenner Exhibit 218 is.

16 A. Kenner Exhibit 218 is a portion of the seven-inch
17 binder from the closing of the joint venture agreement
18 between Windwalker, Na'Alehu Ventures and Lehman Brothers.
19 It's the environmental and hazardous substance
20 indemnification agreement that I signed personally as an
21 indemnitor.

22 Q. What do you mean, you signed it personally as an
23 indemnitor?

24 A. As a result of the agreement with Lehman Brothers as
25 I described before, if there were any biohazards or

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1 environmental hazardous materials found in and around the
2 property that caused any litigation subsequent to the
3 closing of the deal, Lehman Brothers required that they
4 were not to be held responsible for any damage that could
5 occur, from what we knew to be a potential petroleum
6 problem in the ground at one of the adjacent parcels to
7 the subject properties on the map.

8 As a result, and mandatory condition for the
9 closing, Lehman Brothers demanded that somebody sign on
10 behalf of the group as a personal guarantor. The person
11 would effectively be a defendant in a lawsuit if, let's
12 say, the Town of Na'Alehu or the Town of Pahala had a
13 water problem.

14 Q. Did you believe that the execution of that document
15 was necessary in order for this Hawaii project on behalf
16 of your hockey player clients to continue?

17 A. Yes is the answer. If I did not sign this, Lehman
18 Brothers would not have concluded the deal.

19 Q. Did you ever ask any of your hockey player clients
20 that they, rather than you, are to bear that
21 responsibility? Yes or no?

22 A. No, sir.

23 Q. Why not?

24 A. With respect to the risk involved, I didn't think it
25 was appropriate to ask any of them to put themselves in

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1 that position.

2 Q. Is this document an accurate and complete copy of the
3 environmental and hazardous substance indemnification
4 agreement?

5 A. It's a copy of the one that I was sent, I believe,
6 from Larry Markowitz, the closing attorney.

7 Q. Kindly take a look at Kenner Exhibit 77. What is
8 that, sir?

9 A. Kenner Exhibit 77 is the cover sheet for Big Isle
10 Ventures, that was sent to Christopher Manfredi after we
11 hired KPMG, who is one of the biggest appraisal companies
12 in the world, to approve the Waikapuna parcel prior to our
13 first attempt to have Lehman Brothers fund the project.
14 Then in advance of Mr. Constantine and Mr. Hardina (ph)
15 funding the closing of the Waikapuna parcel, in July, on
16 July 1st of 2005, this was delivered to Mr. Manfredi, who
17 testified he was the chief operating officer for the
18 project. And it represents that the Waikapuna parcel
19 appraised prior to our closing for \$35,750,000. That's
20 the parcel I put on the agreement and closed for about
21 \$4.2 million.

22 Q. Sir, that appraisal at that point in time for those
23 members of Little Isle IV that had a percentage interest,
24 should that property have been sold on that day, would
25 those monies have been distributed pursuant to their

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1 ownership interest?

2 A. Yes, sir, we would have. If sold for face value, we
3 would have distributed 30 million to the membership of
4 Little Isle IV.

5 Q. How would that distribution be made, in terms of what
6 would you correlate between the sale and the agreement in
7 his place between you and your hockey player clients?

8 A. As we have discussed earlier, each of the investors,
9 through their lines of credit and/or their cash
10 investments, received an equity ownership stake in Little
11 Isle IV.

12 As an example, Mr. Nolan, for his \$2.2 million
13 line of credit and 100,000 cash contribution, I believe
14 was a 13 percent owner at the time of the August '06
15 closing. So had this property been sold for that value at
16 that time, Mr. Nolan would have received 13 percent of
17 what Little Isle IV received from that closing, which
18 would have been several million dollars.

19 Q. Is this document a true and complete reproduction of
20 the appraisal report that you received and saw?

21 A. This is the summary appraisal report cover sheet.
22 There is approximately a 50-page document that goes behind
23 this with all the detail.

24 Q. We won't produce that in evidence.

25 Take a look at the next one, Kenner Exhibit 217.

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1 Do you recognize that?

2 A. Yes, sir, I do.

3 Q. What is that?

4 A. This is the document you were asked about earlier.

5 This was the second set of bylaws for Little Isle IV that
6 was signed in or about September 1st, I believe September
7 1st of 2004, after conversations between John Kaiser and
8 myself, with respect to lending money specifically to Ken
9 Jowdy at that time.

10 As a result of those conversations, John Kaiser
11 and I decided it was important that not only did we
12 previously believe that prior bylaws allowing for us to
13 invest and to lend money pursuant to the special projects
14 section, but now we were formally going to do that, we
15 were in agreement to do so that in the Purpose section,
16 Article 2, we added some language --

17 Q. Don't read it.

18 A. I was double-checking that's where it was in the
19 second paragraph of Article 2, Purpose, we added language
20 specifically referencing the fact we were going to be
21 lending funds.

22 Q. Is that document an accurate and complete photocopy
23 of the operating agreement, 2004 operating agreement that
24 you just referred to?

25 A. Yes, sir, it is.

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1 Q. Sir, I'm going to ask you to take a look at a
2 document marked Kenner Exhibit 62. Do you recognize that
3 document?

4 A. Yes, sir, I do.

5 Q. What is it?

6 A. This was a 2006 Schedule K-1 tax document that was
7 sent to Owen Nolan at his Los Gatos, California address,
8 as a result of the tax filings following Lehman Brothers'
9 2006 closing with us in August of 2006. It represented
10 Mr. Nolan's then 17 percent stake in the company, which
11 was a 4 percent increase in Little Isle IV as a result of
12 him buying out Joe Juneau's interest in or about 2007
13 prior to us filing the 2006 K-1s.

14 It also reflects Mr. Nolan's total distribution
15 of \$761,458, which a portion of that was his \$42,553
16 repayment from his original 100,000 cash deposit. It also
17 reflects his capital contribution of 2.3 million, which
18 would have been the \$2.2 million line of credit and the
19 100,000 cash contribution, and then as a result of that
20 transaction, his resulting ending capital account balance.

21 MR. MISKIEWICZ: What number was that?

22 MR. HALEY: 62.

23 Q. Now, this document, just for purposes of
24 identification, is titled Schedule K-1. Do you see that?

25 A. Yes, sir.

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1 Q. Who, if anyone, would cause this document to be
2 forwarded to Owen Nolan?

3 A. I would.

4 Q. And for what purpose?

5 A. After we closed the joint venture with Windwalker and
6 Lehman Brothers, I believe we waited about a year and a
7 half to two years to finally get the partnership tax
8 documents from Alan Worden and Windwalker, and it was
9 quite a point of contention to actually get those once we
10 did.

11 Then, as a result of the top-down accounting, we
12 were able then to produce the Little Isle IV tax documents
13 for each of the members of Little Isle IV.

14 Q. At this point in time, were you the operating -- were
15 you the managing member of Little Isle IV?

16 A. I was the managing member of Little Isle IV at this
17 time.

18 Q. What was your understanding as the managing member of
19 Little Isle IV in connection with the issuance of a K-1
20 for tax purposes?

21 A. It was my responsibility to do so. I had only
22 received, during this period of time, only one tax record
23 from Na'Alehu Ventures, where after this point in time,
24 after December 31, 2007, John Kaiser became the managing
25 member of Na'Alehu Management, which was the managing

Kenner - Direct/Haley

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1 agent for Na'Alehu Ventures 2006.

2 Q. Is that document representative of K-1s that you were
3 obligated to forward to your hockey player clients when
4 you had the responsibility and obligation to do so?

5 A. Yes, sir, it is.

6 Q. To your knowledge, would other K-1s have similarly
7 contained that type of information that you have placed on
8 -- that you have testified to appears on that document?

9 A. Yes, sir.

10 Q. Is this a complete and accurate photocopy of the K-1
11 as relates to Little Isle IV as an LLC and Owen Nolan and
12 the partner's name, address, city, state and zip code?

13 A. Yes, sir, it is.

14 Q. I will ask you to take a look at Kenner Exhibit 230.
15 Tell us what that document is, sir.

16 A. Kenner Exhibit 230 is titled Mama Lahoa House
17 agreement. That was signed between myself and John
18 Kaiser. Shortly after -- excuse me, about a year before
19 the joint venture agreement with Lehman Brothers, with
20 respect to the purchase of the home office that I
21 purchased for the company in Hawaii. At the time, Mr.
22 Kaiser and Mr. Manfredi in 2005, with the real estate
23 markets skyrocketing, were upset with me that frankly I
24 was going to purchase the home --

25 Q. Let me stop you there. My only question, sir, you

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1 have identified that document, is that correct?

2 A. Yes, sir, I have.

3 Q. Is this document a fair and accurate copy of the Mama
4 Lahoa House agreement that you just made reference to, yes
5 or no?

6 A. Yes, sir.

7 Q. Mr. Kenner, with reference to the exhibits that you
8 have thus far identified as presented to you within the
9 last 30 minutes, half hour, how did you acquire these
10 documents, sir?

11 A. All of those documents were turned over to you by the
12 U.S. government, and subsequent to that, you turned them
13 over to me for review in pretrial.

14 MR. HALEY: This may be an appropriate time.

15 THE COURT: Let's take the lunch break.

16 Reconvene at 2:10. Don't discuss the case. Have a good
17 lunch.

18 (The jury leaves the courtroom.)

19 THE COURT: If everyone can be seated. Mr.
20 Kenner, stay up there.

21 You want to ask your client supplemental
22 questions on the tape?

23 MR. HALEY: I do.

24 THE COURT: You understand you are still under
25 oath, Mr. Kenner?

Kenner - Direct/Haley

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1 THE WITNESS: Yes, sir, I do.

2 THE COURT: What's the matter?

3 MR. LaRUSSO: We hadn't finished our
4 conversation.

5 THE COURT: You want to come back earlier from
6 lunch?

7 MR. HALEY: Yes, your Honor. I think it would
8 be beneficial to do so and save time.

9 THE COURT: Can you come back at ten to 2:00?

10 MR. HALEY: Sure.

11 THE COURT: How much more on direct?

12 MR. HALEY: As I said, the spheres get smaller
13 and smaller for purposes of the court as well as the
14 government. This was the largest package of documents in
15 what I needed my client to identify. I do have documents
16 as relates to Led Better, GSF and Eufora.

17 To answer your question, maybe another half
18 hour, Judge. My intention at that point in time would be
19 then for the documents I have identified, to offer them
20 into evidence and leave the government as well as Mr.
21 LaRusso the opportunity to conduct whatever voir dire or
22 objections they wish to make as relates to the documents.

23 THE COURT: If you can somehow group the
24 documents. You are asking for each document, "is this
25 fair, accurate and complete." Maybe you can do it for the

Kenner - Direct/Haley

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1 whole set rather than each document.

2 MR. HALEY: Thank you. I will do that rather
3 than go through that. I will ask him to identify the
4 document and then ask those questions at the end. I
5 appreciate your Honor's suggestion. Thank you.

6 THE COURT: See you at ten to 2:00.

7 (Whereupon, a luncheon recess was taken at this
8 time.)

9 (Continued on the next page.)

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Kenner - Direct/Haley

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A F T E R N O O N S E S S I O N

2 pm

PHILLIP A KENNER

called by the Defense, having been previously
duly sworn/affirmed, continued testifying as
follows:

(The following ensued in the absence of the
jury.)

THE COURT: Mr. Kenner, if you could, come up to
the stand. You.

Understand you are still under oath?

THE WITNESS: Yes, sir.

MR. LaRUSSO: Before we proceed. I know the
court puts everything on the record but this concerns
possible privilege and I have something I would like to
put on the record. If the court wants to make it public,
that is fine, but it does deal with privilege. I'm a
little concerned about it.

THE COURT: You can approach.

(Continued on the following page.)

S E A L E D R E C O R D

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1 THIS PORTION OF THE TRANSCRIPT IS SEALED

2 (Discussion at sidebar ensued as follows.)

3 THE COURT: So that the record is clear, Mr.
4 LaRusso said this is going to be on the record but just
5 done at sidebar.

6 MR. LaRUSSO: Just summarizing what I anticipate
7 happening.

8 Mr. Haley is going to elicit from his client
9 that the testimony he gave last Thursday was not correct.
10 Or was incorrect. He is going to testify that he was
11 given questions by my client, questions, and based upon
12 those questions I don't know what he is going to say.

13 I know that he was told not to lie or anything,
14 but what he says I will hear for the first time while he
15 is on the stand.

16 Also, the record is I did have a conversation
17 with my client before that. It is privileged; however, I
18 have asked him if I could disclose it. He said I could.

19 What the facts are is that he asked me about
20 this. I basically told him you can't suggest any answers.
21 You can't tell him the answers.

22 I'm concerned about that because he wanted to
23 talk to him about the tape.

24 MR. HALEY: Talk to who?

25 MR. LaRUSSO: Your client. I'm doing all the

S E A L E D R E C O R D

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1 work.

2 He then comes back to me and, I don't know at
3 what point, and he says to me what if I write out
4 questions? And -- quite candidly, judge, a major
5 mistake -- I said yes. And that is last I heard of it,
6 judge. I didn't know anything any more. I didn't even
7 see the questions until later on. And then Mr. Oliveras
8 becomes involved.

9 And maybe you can explain to the court what
10 happened next.

11 MR. OLIVERAS: What happened next was, he showed
12 me the questions and asked me were these questions good.
13 Now, I have to put that in the context that through all of
14 the trial he has been writing questions.

15 THE COURT: I have seen that.

16 MR. OLIVERAS: I assumed what they were and I
17 said Bob knows what to do with that.

18 Later on that day, while I was sitting where I
19 usually sit, he showed them to Phil as I was sitting right
20 there and he says could you take a look at these. And he
21 looked at them and then Phil says: Tom, I'm okay with all
22 of them except for this one. And then he said just ask
23 him the questions, basically.

24 MR. HALEY: The problem with that process,
25 judge, is, these questions were presented to my client

S E A L E D R E C O R D

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1 without my knowledge or my authorization.

2 Counsel for Mr. Constantine allowed
3 Mr. Constantine to communicate with my client through
4 these letters, through the correspondence that was
5 submitted to my client, without it being given to me.

6 Had this been given to me, I would have had an
7 opportunity to discuss with my client the questions that
8 purportedly were going to be asked by Mr. LaRusso. I
9 mean, that is, I don't mean to be, but that is in
10 violation of disciplinary rules.

11 You cannot communicate, whatever the form of
12 communication, you can't communicate with represented
13 parties, whatever the communication, whether they are
14 suggesting answers or not. And I have a view as to why
15 Tommy Constantine gave my client these questions. I have
16 a view as to what he hoped my client would say as a result
17 of giving these questions to my client. But it resulted
18 in a circumstance where my client ended up testifying
19 ultimately inconsistent with previous conversations I had
20 with my client.

21 I believe, your Honor, that I know, at least
22 based upon conversations I have had with my client this
23 morning and based upon the weekend, that he is now
24 prepared to authenticate that tape and explain to the
25 court the circumstances under which he gave an answer that

S E A L E D R E C O R D

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1 we believe we know to be untruthful.

2 MR. LaRUSSO: May I make a couple of statements.

3 At the time I gave an okay, I didn't think
4 through the consequences. Let me be very candid with you.
5 But I do know, contrary to what Mr. Haley has suggested,
6 there has been lots of communication going back and forth
7 between the two.

8 I know you take exception to that because you've
9 told my client many times not to do it.

10 MR. HALEY: How many times have I told your
11 client to stay away from my client?

12 MR. LaRUSSO: But they've communicated. They
13 have exchanged information during the trial. Even helped
14 each other with documents at times. I saw them passing
15 documents from the computer.

16 But that is not an excuse and I'm not offering
17 that as an excuse. I want to let the court know I'm
18 waiving privilege in regards to what he told me because he
19 told me to tell the court that. And that --

20 THE COURT: The bottom line is, let me hear what
21 Mr. Kenner's testimony is now.

22 Assuming he authenticates the tape, then we are
23 in the same position we were before this all came up.

24 The government can play it if you want.

25 MR. HALEY: Right.

S E A L E D R E C O R D

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1 THE COURT: The only issue that will come up is
2 if you attempt to impeach him regarding the fact that he,
3 outside the presence of the jury, testified differently,
4 you would then be implicating your client's communications
5 with him, which is problematic.

6 MR. LaRUSSO: Judge, I'm doing this because it
7 completes the record.

8 As a matter of fact, I told Mr. Haley about this
9 letter after the testimony. Okay?

10 MR. HALEY: You did.

11 MR. LaRUSSO: I didn't hide that. I knew that
12 wasn't privileged. At that point maybe things started to
13 clear in my mind and that is why I communicated to him.
14 He was even present when I said these notes should be
15 preserved.

16 So I'm just trying to indicate to the court I
17 don't intend to open up the door to this coming before the
18 jury. I don't know what the government is going to do.
19 They have a right to proceed in any way possible. But I
20 just don't want to be a witness at this trial. That is my
21 concern.

22 MR. HALEY: We can make this real simple, Judge.

23 I spent Saturday morning a little bit looking at
24 the New York State Code of Professional Responsibility,
25 and I spoke with my client this morning.

S E A L E D R E C O R D

4539

1 The hearing, from my perspective, as relates to
2 the tape, has yet to be concluded. He is prepared to
3 rectify, before that record is closed, his testimony
4 regarding the authenticity of that tape. And we can make
5 it that simple. If people want to then inquire as to the
6 circumstances under which he made that false statement,
7 they are entitled to do so, but that opens up that
8 proverbial Pandora's box.

9 MR. LaRUSSO: But the point is, he was never
10 told to lie, and he will testify to that, I'm assuming.

11 MR. HALEY: He was never told to lie.

12 THE COURT: I understand what the situation is.

13 Why don't we have the hearing. Before anyone,
14 before the jury, makes any inquiry regarding what
15 transpired here, you have to get clearance from me first.

16 So if the government determines that something
17 that happened outside the presence of the jury should be
18 the subject of questioning Mr. Kenner, you have to ask my
19 permission first. And the same would go for you.

20 Right now you don't have any intention of doing
21 that. I don't know if the government has any intention of
22 doing that.

23 MR. MISKIEWICZ: Not in front of the jury. We
24 may want to just nail down a couple of things in the
25 hearing.

S E A L E D R E C O R D

4540

1 We would like a copy of whatever this script is
2 that he has.

3 MR. LaRUSSO: Mr. Haley said to give you a copy
4 and I have no objection to that.

5 MR. HALEY: I said not yet.

6 MR. LaRUSSO: With one qualification. This one
7 section. Am I correct, you saw this one section between
8 six and seven on the margin was not there. Eight was not
9 crossed out when it was shown to him. It was crossed out
10 after the conversation.

11 MR. HALEY: In that regard, I probably have two
12 or three questions.

13 MR. LaRUSSO: So that I don't run afoul of your
14 request, in this hearing I can explore that.

15 THE COURT: Yes. I'm only talking about in
16 front of the jury.

17 MR. LaRUSSO: Thank you.

18 MR. HALEY: Well, you can ask him questions
19 about this.

20 (Discussion at sidebar was concluded.)

21 (Continued on the following page.)

22

23

24

25

Kenner - Direct/Mr. Haley - Jury Out

4541

1 (The following ensued in open court in the
2 absence of the jury.)

3 THE COURT: Go ahead, Mr. Haley.

4 MR. HALEY: Thank you, your Honor.

5

6 DIRECT EXAMINATION (Continued)

7 BY MR. HALEY:

8 Q. Mr. Kenner.

9 A. Yes, sir.

10 Q. You recall that you testified before the court on
11 June 18, 2015, with respect to what is being called the
12 Home Depot tape.

13 Do you know which tape we are referring to?

14 A. Yes, sir, I do.

15 Q. And you recall that you were asked various questions
16 about that tape by Mr. LaRusso. Correct?

17 A. Yes, sir.

18 Q. And, indeed, you were also asked questions about that
19 tape by Mr. Miskiewicz. Correct?

20 A. Yes, I recall.

21 Q. Prior to your testimony on June 18, 2015, with
22 reference to the Home Depot tape, had you had the
23 opportunity to listen to it?

24 A. Yes. I listened to it most of it that morning.

25 Q. How did you acquire that opportunity?

Kenner - Direct/Mr. Haley - Jury Out

4542

1 A. That morning, before proceedings began, a copy of the
2 26-minute tape was given to me and I was able to listen to
3 it on my laptop.

4 Q. Who gave you that copy to listen to?

5 A. I received it from you.

6 Q. Since listening to the tape on June 18, 2015, have
7 you had an opportunity to listen again to the tape between
8 then and now?

9 A. Yes, sir. I listened to it four more times.

10 Q. Mr. Kenner, to the best of your recollection is the
11 conversation you had with Tommy Constantine accurately and
12 completely recorded on that 27-minute portion of the
13 entire conversation you listened to?

14 A. Yes, sir, I believe it is.

15 Q. We know, sir, that, as you recall, the conversation
16 between yourself and Mr. Constantine you had recorded on
17 your iPhone lasted more than 27 minutes. Is that correct?

18 A. Yes, sir, that's correct.

19 Q. And approximately how long was that conversation you
20 had recorded on your iPhone?

21 A. I believe the original recording was 56 minutes and
22 33 seconds.

23 Q. Have you had an opportunity to listen to the entire
24 recording, other than that 27 minutes of conversation?

25 A. No, sir. I don't know where it exists.

Kenner - Cross/Mr. Miskiewicz - Jury Out

4543

1 Q. You have been present, Mr. Kenner, when various
2 witnesses have authenticated documents and even
3 recordings. Isn't that true?

4 A. Yes, sir, I have.

5 Q. Do you have any reason, to the best of your
6 knowledge, to doubt the authenticity of that 27 minutes of
7 conversation as recorded by you between yourself and
8 Mr. Constantine with respect to that Home Depot tape?

9 A. No. Now that I've had a chance to review it again, I
10 believe it's accurate.

11 MR. HALEY: Judge, I have no further questions.

12 THE COURT: Mr. LaRusso?

13 MR. LaRUSSO: Can I have one moment, your Honor?
14 (There was a pause in the proceedings.)

15 MR. LaRUSSO: No questions, your Honor.

16 THE COURT: Mr. Miskiewicz?

17 MR. MISKIEWICZ: Very briefly.

18

19 CROSS-EXAMINATION

20 BY MR. MISKIEWICZ:

21 Q. Mr. Kenner?

22 A. Yes, sir.

23 Q. This recording was made in a Home Depot?

24 A. Yes, sir, it was.

25 Q. In Scottsdale, Arizona.

Kenner - Cross/Mr. Miskiewicz - Jury Out

4544

1 A. Yes, sir.

2 Q. And it was made during an unscheduled or impromptu
3 meeting with Mr. Constantine.

4 A. Impromptu. Correct.

5 Q. And those are your voices, both yours and his, on the
6 recording. Is that correct?

7 A. Yes, that's correct.

8 Q. And your testimony last week, insofar as you have
9 recalled references to Ken Jowdy being missing from the
10 existing 26 or 27-minute portion of the recording that
11 still exists, is that are you now saying that is in error?

12 A. Yes, sir. That's correct.

13 Q. So the commentary that you made -- withdrawn.

14 The testimony that, about an analogy that was
15 used to compare Mr. Constantine used, comparing you and he
16 to a bunch of bank robbers, one of you being the robber
17 the other one being the getaway driver, your testimony was
18 that that was in fact originally a reference to Ken Jowdy.

19 Do you remember saying that on Thursday?

20 A. I don't believe the reference to the bank robber and
21 the getaway car was referencing Mr. Constantine and
22 myself.

23 Q. All right. But is it your testimony that there is
24 nothing missing in that portion of the conversation?

25 In other words, whatever it is that

Kenner - Cross/Mr. Miskiewicz - Jury Out

4545

1 Mr. Constantine said, the word *Jowdy* or *Ken*, was not
2 removed.

3 A. I don't believe so. I believe that accurately
4 reflects what was said at that time.

5 Q. And then you said also that there were times when --
6 withdrawn.

7 You said that shortly after or sometime after
8 you played the recording, you provided something to
9 Mr. Kaiser with which to make a duplicate of that
10 recording. Do you remember that?

11 A. Yes, sir. That's correct.

12 Q. When did that happen?

13 A. I believe it happened about two weeks later.

14 Q. And do you remember when you made the recording?

15 A. The original record on my iPhone?

16 Q. In other words, when you met Mr. Constantine in this
17 Home Depot, do you remember approximately when that was?

18 A. I believe the impromptu meeting between
19 Mr. Constantine and I occurred on August 3 of 2010.

20 And I handed over my phone to Mr. Kaiser and,
21 actually, Mr. Berard, upon further review on the 18th,
22 about 15 days later when they arrived in Scottsdale,
23 Arizona.

24 Q. How were you able to recollect the date that you made
25 the recording originally?

Kenner - Cross/Mr. Miskiewicz - Jury Out

4546

1 A. I went back to some text messages that I had sent to
2 Mr. Constantine immediately following the meeting where he
3 had requested some resolution from the issues that were
4 handled between the group of Eufora investors and himself,
5 and had offered during that recording, and I heard it
6 again when I listened to it on the weekend, that I had
7 offered to let the people in New York, referring to
8 Mr. Stolper and his team, speak to Mr. Constantine
9 directly; that I was not the person in charge of the
10 investigation.

11 So I had sent an email to Mr. Constantine that
12 afternoon letting him know that I had passed along the
13 information.

14 Q. And did you also, in reviewing the recording, at all
15 take note of the fact that the recording is date-stamped
16 digitally date-stamped I believe August 3, 2010?

17 In your review of discovery did take note of
18 that?

19 A. I did not.

20 Q. I'm sorry. August 2, 2010.

21 A. I --

22 Q. Did you take note of that in your review of the
23 digital recording?

24 A. No. I said August 3. It was August 2.

25 I didn't know that. I was referencing the fact

Kenner - Cross/Mr. Miskiewicz - Jury Out

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1 that I had sent Mr. Constantine a text message, and I
2 believe on August 3. And that was my reference to the
3 date because I even remember sending it after the meeting,
4 the impromptu meeting at Home Depot concluded.

5 Q. Immediately after?

6 A. I don't recall exactly but I remember sending it
7 because Mr. Constantine inferred that there was very
8 little time left for Mr. Constantine to deal with the
9 investors with respect to Mr. Volpe.

10 Q. When did Mr. Kaiser have access to the phone on which
11 the original recording was made? That is my question.

12 A. Not until the 18th.

13 Q. And then that is when you made a DVD or a CD or
14 whatever?

15 A. No. I'm not sure what Mr. Kaiser did with it at that
16 point. I actually made, after my impromptu meeting, I had
17 contacted immediately Mr. Stolper. I told him that there
18 was an impromptu meeting and that I had recorded it. And
19 Mr. Stolper asked me if I would send him along a copy of
20 it.

21 So I do recall making a copy from my iPhone to a
22 disk and then sending it by mail Mr. Stolper. And I think
23 at some point either Mr. Stolper or myself told
24 Mr. Kaiser, Mr. Berard, Mr. Gentry, Mr. Gaarn and the
25 others that were involved, Mr. Hasiamos, the others that

Kenner - Cross/Mr. Miskiewicz - Jury Out

4548

1 were involved in the investigation, and I let them know
2 that I had sent a copy to Mr. Stolper.

3 Q. Okay. Insofar as there is some portion of this
4 recording now that is no longer on the phone sometime
5 after 26 or 27 minutes, do you have any idea, do you have
6 any personal knowledge as to what happened to the
7 remainder of that recording?

8 A. All I could piece back together after listening to it
9 again and recalling that I had sent a copy to Mr. Stolper
10 immediately was perhaps something occurred with a portion
11 of the recording on my iPhone and it was deleted in part
12 after I had made the recording.

13 The other recordings I know that were
14 circulating, I believe Mr. Kaiser did make a copy from my
15 phone in or around August 18 when he was in Scottsdale,
16 Arizona. And so whatever was on my phone at that point in
17 time is whatever Mr. Kaiser would have had on his disk.

18 So I don't know what copy of the recording I
19 listened to the other day.

20 Q. And the government proffers that there was a copy
21 downloaded from the original iPhone which was seized
22 pursuant to a search warrant.

23 Okay. No further questions. Thank you very
24 much, Mr. Kenner.

25 MR. LaRUSSO: Your Honor, may I just ask a few

Kenner - Cross/Mr. LaRusso - Jury Out

4549

1 questions?

2 THE COURT: Yes.

3

4 CROSS-EXAMINATION

5 BY MR. LaRUSSO:

6 Q. Mr. Kenner, you said that you made a copy for
7 Mr. Stolper immediately or shortly after it was recorded
8 at Home Depot.

9 Is that correct?

10 A. Yes, sir. I believe within 24 hours.

11 Q. That would have contained the entire 57-minute
12 conversation. Is that correct?

13 A. That would have been my attempt to do so. Correct.

14 Q. And then you said that after, you had made that copy
15 and sent it to Mr. Stolper and then provided your iPhone
16 to Mr. Kaiser. Is that correct?

17 A. That would have been about two weeks later.

18 Q. Do you know, at the time you provided to the iPhone
19 to Mr. Kaiser, whether the entire conversation was on
20 there or a portion of the conversation was on there?

21 A. That I do not know.

22 Q. When did you first realize that your iPhone only
23 contained, I believe you said, 26 minutes of the
24 conversation you had at Home Depot?

25 A. The first time that I realized that was on or about

Kenner - Cross/Mr. LaRusso - Jury Out

4550

1 the 18th of August. Approximately two weeks after the
2 original recording had happened at Home Depot.

3 Q. So that the portion that you are saying was deleted
4 from the iPhone occurred between the time it was made and
5 August 18?

6 A. The best I can recall, yes.

7 Q. And your testimony last Thursday in regards to
8 Mr. DeVries, how was that relevant to the inquiry
9 regarding the tape and what was on the tape?

10 A. My reference to Mr. DeVries was simply the fact that
11 after approximately August of 2010 I don't recall
12 listening to the recording ever again until approximately
13 September or October of 2013m when I came across the
14 recording on my iPhone again, and I was with Mr. DeVries
15 in Mexico.

16 Q. And just a last question. When did you first realize
17 that the conversation that you had recorded at Home Depot
18 no longer had the portion that were talking about as
19 having been removed or deleted?

20 A. I believe that would have been on or about the 18th
21 of August 2010.

22 Q. And how do you know that?

23 A. About two weeks afterwards.

24 Q. How do you know that?

25 A. The only reference I have to that is that I sent a

Kenner - Cross/Mr. LaRusso - Jury Out

4551

1 text message related to that. It is 26 minutes.

2 Q. Related to the fact that there was a portion missing?

3 A. No, related to the fact that I had a 26-minute
4 meeting.

5 Q. You knew it was 57 minutes.

6 A. 56 minutes and 33 seconds.

7 Q. I guess I'm asking it inartfully, but did you replay
8 the tape to ensure that the portion was missing on the
9 18th?

10 A. No, I did not.

11 I looked at the timer that I believe shows up on
12 the line item that you can initiate the replaying of the
13 audio recording.

14 Q. And who had your iPhone before you noticed on the
15 18th that the time was only approximately 26 minutes of
16 recording?

17 A. I believe I gave it to Mr. Kaiser and Mr. Berard to
18 listen to that morning.

19 Q. And did you leave the phone in their custody?

20 A. Yes. I did not listen to the phone while they were
21 listening to it.

22 MR. LaRUSSO: Thank you, your Honor.

23 THE COURT: All right. So can we continue with
24 the jury.

25 MR. LaRUSSO: Yes.

Kenner - Cross/Mr. LaRusso - Jury Out

4552

1 THE COURT: You are going to get the rest of the
2 documents in and you are going to authenticate the
3 recording and play it?

4 MR. HALEY: Your Honor, I'm going to ask Mr.
5 Kenner questions about the recording.

6 Then I will probably rest and leave it for the
7 government to introduce. And in redirect I will
8 straighten that out, because I think it would just take
9 too much time at this point.

10 THE COURT: Let's bring in the jury.

11 MR. LaRUSSO: While the jury is being brought
12 into the courtroom, any objection to dealing with that
13 sidebar?

14 THE COURT: I wouldn't have an objection.

15 You can discuss it later. I will place it under
16 seal for now.

17 I'm placing the sidebar under seal for now until
18 we have a chance to discuss it.

19 MR. LaRUSSO: Thank you, your Honor.

20 (The following ensued in the presence of the
21 jury at 2:25 pm.)

22 THE COURT: Please be seated.

23 You may proceed, Mr. Haley.

24 MR. HALEY: Thank you.

25

Kenner - Direct/Mr. Haley

4553

1 PHILLIP A KENNER

2 called by the Defense, having been previously
3 duly sworn/affirmed, continued testifying as
4 follows:

5

6 DIRECT EXAMINATION (Continued)

7 BY MR. HALEY:

8 Q. Mr. Kenner, I'm going to ask you to take a look at
9 two documents, marked Kenner Exhibit 85 and Kenner Exhibit
10 84 for identification.

11 A. Yes, sir.

12 Q. Now, as relates to those exhibits, just for purposes
13 of the record these are K1s. Is that correct?

14 A. Yes, sir.

15 Q. And as relates to -- withdrawn. Who, in or about
16 2004, 2005, was the managing member for Standard Ventures
17 LLC?

18 A. At all times I understand Tim Gaarn was the manager
19 of Standard Ventures.

20 Q. Have you seen these two documents -- withdrawn.

21 Prior to your arrest, had you seen these two
22 documents?

23 A. I don't believe I saw Kenner Exhibit 84, but I had
24 seen Kenner Exhibit 85.

25 Q. Well, to your knowledge, in or about 2005 did

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1 Standard Ventures LLC have an ownership equity interest in
2 Eufora LLC?

3 A. Yes, sir, it did.

4 Q. And when you were recommending to your clients that
5 they acquire a percentage of ownership interest in Eufora
6 by way of purchasing a percentage of Timothy Gaarn's
7 interest in the company, at that point in time did you
8 ever have a good-faith belief that Timothy Gaarn did indeed
9 have an ownership interest in Eufora?

10 A. Yes, sir, that's correct.

11 Q. Is Kenner Exhibit 85 consistent or inconsistent with
12 your belief?

13 A. Consistent.

14 Q. Would you take a look at Kenner Exhibit 83. Do you
15 recognize that document.

16 A. Yes, sir, I do.

17 Q. What is it?

18 A. It is a copy from Bank of America of a check that I
19 wrote to Tim Gaarn on October 25, 2010, for \$2000.

20 Q. And what was the purpose of writing at least that one
21 check on that day?

22 A. As that point in time in 2010 I still owed Mr. Gaarn
23 money from the loans he had given me in early 2009. And
24 on my memo line I write *Kenner Loan Repay* with a check for
25 Mr. Gaarn for \$2,000.

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1 Q. Why did you put that notation on the check, itself?

2 A. So he knew what the \$2,000 was for.

3 Q. Now if you take a look at Kenner Exhibit 82. It is a
4 number of documents.

5 Do you recognize the documents attached to
6 Kenner Exhibit 82?

7 A. Yes, sir, I do.

8 Q. And what are those documents?

9 A. There are three specific types of documents. One is
10 a number of my bank statements that show that Tim Gaarn
11 and Suzy Gaarn, his wife, received deposits from my bank
12 accounts, my various bank accounts, as loans.

13 There are also a couple of documents that are
14 emails that I sent to my bankers at Wells Fargo requesting
15 wire transfers to Timothy and Suzy Gaarn with banking
16 information attached.

17 And then, lastly, I believe there is one email
18 from Tim Gaarn to myself dated September 9, 2008, where he
19 is requesting I send money directly to his mortgage
20 company to keep his home out of foreclosure.

21 Q. Are these the loans that you referred to earlier in
22 your testimony in connection with money loaned to Tim
23 Gaarn which was being repaid to you by virtue of your
24 client's acquiring interests pertaining to a percentage
25 interest that Timothy Gaarn was conveying to your clients?

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1 A. Yes, sir, that's correct.

2 Q. Take a look at Kenner Exhibit 223.

3 Would you identify that document for us.

4 A. This is a consulting agreement that Tim Gaarn signed
5 with Little Isle IV and Na'alehu Ventures in June of 2006
6 with respect to funding that he was looking for and
7 assisting with regard to the Hawaii project.

8 Q. Why did you execute a consulting agreement with
9 Timothy Gaarn?

10 What if anything to your knowledge did he have
11 to offer in connection with the Hawaii project?

12 A. Mr. Gaarn for a number of years had been working on
13 raising funding sources very similar to Mr. Constantine.
14 And at one point in June of 2006 I asked Mr. Gaarn or Mr.
15 Gaarn asked me -- I don't recall the order -- to
16 memorialize it in writing, so we did.

17 Q. Well, you heard Mr. Gaarn testify in this courtroom.
18 Is that correct?

19 A. Yes, I did.

20 Q. Were moneys paid to him out of the Hawaii project
21 accounts? Yes or no?

22 A. Yes.

23 Q. And on what basis were those monies paid to him?

24 A. They were paid to Mr. Gaarn pursuant to this
25 consulting agreement. I believe there is a minimum

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1 payment of \$50,000 to Mr. Gaarn for his efforts, and I do
2 believe he was paid \$45,000.

3 There is also a provision in here that he would
4 be entitled to 5 percent of the gross amount of financing,
5 which frankly we never ended up paying him, which would
6 have been the equivalent of about \$1.3 million, at the
7 conclusion of the first \$26 million that Lehman Brothers
8 funded us in Hawaii.

9 Q. Well, when Mr. Gaarn testified in this courtroom, did
10 to the best of your knowledge did he correlate any monies
11 he received from Little Isle IV with that consulting
12 agreement?

13 A. I was confused by Mr. Gaarn's testimony with respect
14 to this consulting agreement, frankly.

15 Q. Okay. I'm going to show you now actually several
16 exhibits. Kenner Exhibit 224, Kenner Exhibit 225, and
17 Kenner Exhibit 226. Actually, 227 I trust is not
18 repetitive. Perhaps you can tell me if they are.

19 A. They are all unique.

20 Q. And would you kindly identify what those documents
21 are.

22 A. Yes, sir.

23 Kenner Exhibit 224 is the conveyance of stock
24 that I originally owned through my company Guide Dog LLC
25 on January 1 of 2005. This was the document that

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1 memorialized that transaction with Mr. Gaarn.

2 Kenner Exhibits 225, 226, and 227 are very
3 similar documents. Once Mr. Gaarn took over as the
4 manager of AZ Eufora Partners entities from me, which
5 included AZ Eufora Partners II, III, and IV, there were
6 three transfers pursuant to Mr. Gaarn to consolidate those
7 three partnerships into one single LLC, known as AZ Eufora
8 Partners I LLC. These were all prepared I believe by CR
9 Gentry, all four of those documents.

10 Q. Now, each one of these documents bears a date, dated
11 this first day of January 2005.

12 Do you see that?

13 A. Three of the four of them actually do. The transfer
14 of AZ Eufora Partners III to AZ Eufora Partners I was
15 actually dated the first day of August 2005, and I'm not
16 sure why there was a difference on that one.

17 Q. Were they actually executed on the dates as reflected
18 in those documents?

19 A. No.

20 Q. Would you describe the circumstances under which they
21 came to be, I guess I will call them postdated.

22 A. These documents were signed sometime in or around
23 October of 2008 as a result of Mr. Constantine hiring
24 Mr. Gentry as the chief executive officer at Eufora. And
25 after Mr. Gentry came on board at Eufora, I believe he was

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1 in charge of making sure all the books and records and
2 accounting had been documented properly.

3 And after a series of meetings with Mr. Gentry,
4 Mr. Gaarn, Mr. Constantine, and myself, we were able to
5 make sure that not only did we reconstruct these
6 transactions probably and then memorialize them based on
7 the dates they were originally agreed to, but I know
8 Mr. Gentry was also working diligently with Mr. Gaarn and
9 Mr. Constantine to make sure the books and records
10 accurately reflected the investments in the corporation?

11 Q. Well, on your part, were you engaged in some scheme
12 or artifice to defraud your hockey player clients by
13 having knowledge that documents were postdated in order to
14 clear up the books and records so that your clients'
15 ownership interest in Eufora would be recorded on the
16 books and records?

17 A. No, sir.

18 Q. I'm going to show you Kenner Exhibit 80, which I
19 believe is in evidence as Constantine 140.

20 But as relates to that document, do you recall
21 seeing that document during the court of this trial prior
22 to today?

23 A. Yes, sir, I do.

24 Q. What is that? Just so we can acclimate ourselves.

25 A. Well, this was an email sent from CR Gentry to Tim

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1 Gaarn and copy to me, Edrozo, who I believe was the
2 secretary of Eufora in or about 2009 confirming all of
3 Mr. Gaarn's private stock sale from Standard Ventures to
4 my respective clients Glenn Murray, Greg DeVries, Steve
5 Ruchin, and William Ranford at that point in time and the
6 conveyance of stock that they were to receive as a
7 transfer from Standard Ventures, Mr. Gaarn's company, into
8 their own name inside AZ Eufora Partners I.

9 It also reflects Mr. Gaarn's residual interest
10 of 1.9 percent of Eufora after the completion of these
11 stock transactions.

12 Q. As you sit here today, do you have any reason to
13 doubt the legitimacy of the information contained in that
14 document?

15 A. I believe it to be 100 percent accurate.

16 Q. In your direct testimony you had referred to a
17 spreadsheet created by CR Gentry. Is that correct?

18 A. Yes, sir, I recall that.

19 Q. And before his discharge by Mr. Constantine, what was
20 his position at Eufora, to the best of your knowledge?

21 A. I believe he was the chief executive officer.

22 Q. If you know, of your own personal knowledge, how did
23 he acquire the information that was set forth that that
24 spreadsheet you saw?

25 A. Mr. Gentry held a series of meetings with myself, Mr.

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1 Gaarn, and Mr. Constantine with respect to all the
2 transactions that had occurred effectively from the
3 beginning of my involvement in Eufora, in or about August
4 of 2002, until the time that he completed the
5 spreadsheets.

6 In particular, he was interested in what was
7 going on with -- what knowledge I had prior to 2005, and
8 Mr. Gaarn, what knowledge he had subsequent to my transfer
9 of interests in management status to him in January of
10 2005.

11 Q. To your knowledge why was it necessary to create that
12 spreadsheet?

13 A. I think it was after a number of years there were
14 questions whether or not the books and records accurately
15 had tracked all the inbound and outbound money transfers
16 and subsequent equity transfers. And I think with respect
17 to Mr. Gentry's efforts, that was part and parcel to his
18 ability to assist the company and go out and raise more
19 funding for operational capital, which they completed in I
20 believe early 2009 with Neptune Capital.

21 Q. Mr. Gaarn's efforts in that regard and the
22 spreadsheet he created, did that have any benefit to your
23 hockey player clients?

24 A. The spreadsheet --

25 MR. MISKIEWICZ: Objection.

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1 A. -- was created by Mr. Gentry.

2 THE COURT: Overruled.

3 You can answer that. Go ahead.

4 A. I'm sorry.

5 The spreadsheet was created by Mr. Gentry in
6 order to accurately depict the ownership interests in
7 Eufora for my clients.

8 Q. Would you kindly take a look at Kenner Exhibit 228.

9 Mr. Kenner, without commenting on the content of
10 that document, is that the spreadsheet that you reviewed
11 as provided to you by CR Gentry? Yes or no?

12 A. Yes.

13 (Continued on the following page.)

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1 BY MR. HALEY:

2 Q. Not including Kenner Exhibit 228, bear with me,
3 Mr. Kenner, Kenner Exhibits 223, 224, 225, 226, 227 and
4 Exhibit 82, Kenner Exhibit 83, are complete and accurate
5 photocopies of the information contained on those
6 documents?

7 A. Yes, sir.

8 Q. And how did you acquire those copies, sir?

9 A. I acquired each of these from the U.S. Government,
10 they delivered them to you, and then subsequently you
11 delivered them to me for review in pretrial.

12 Q. Thank you, sir.

13 Mr. Kenner, I'm going to ask you to take a look
14 at a document marked Kenner Exhibit 97.

15 A. Yes, sir.

16 Q. Do you recognize that document?

17 A. Yes, sir, I do.

18 Q. What is it?

19 A. This is a document that was produced to me during
20 litigation when 1st Source Bank of Indiana sued myself and
21 Sergei Gonchar as a result of Ken Jowdy defaulting on the
22 aircraft loan on the Falcon 10 and the Metro Liner.

23 Q. Is this document an accurate and complete photocopy
24 of the Diamante Air, a Limited Liability Company Operating
25 Agreement?

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1 A. This document is a photocopy of a Diamante Air
2 Limited Liability Operating Agreement, but this was a
3 fraudulent one that Mr. Jowdy produced for the bank.

4 So it's not the one that was originally provided
5 to the bank.

6 Q. What do you mean? In what sense was it fraudulent?

7 A. In or about October of 2005, Mr. Jowdy had asked me
8 if myself, and a couple of the members along with him and
9 himself, would secure a loan for the Falcon 10 in order to
10 do repairs on the airplane which were necessary to the
11 tune of about \$750,000.

12 So I agreed and Sergei Gonchar agreed to be
13 guarantors on a new loan with the bank that would provide
14 capital so we could fix the landing gear and engines on
15 the Falcon 10.

16 Mr. Jowdy purported to me that he would be a
17 guarantor on the aircraft as well.

18 About a month later, on November 14, just prior
19 to November 14, when the bank had already received the
20 original operating agreement that I had signed as a
21 managing member and Mr. Jowdy's friend Mark Thalmann had
22 signed as a manager, Mr. Gonchar and I signed our
23 guarantor notices and received no other documents from 1st
24 Source Bank.

25 We were told by Mr. Jowdy that's all the bank

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1 needed to release the loan was just our personal guarantor
2 signatures.

3 I came to find out when we were sued about a
4 year-and-a-half later by 1st Source Bank in Indiana and
5 Rick Rozenboom, who was here, that other documents had
6 been presented to the bank.

7 The loan documents, which I had never seen until
8 the lawsuit, were signed on November 14 of 2005 by Mr.
9 Jowdy as the managing member of Diamante Air, which he was
10 not.

11 What I also found in the package was this
12 operating agreement that appears to have been signed by
13 Mr. Jowdy.

14 He added his name as one of the managers of
15 Diamante Air and it was faxed two days after the loan
16 documents were signed.

17 As part of that lawsuit I also discovered that
18 on November 14, Mr. Jowdy also diverted \$290,000 cash from
19 the new loan to his bank account under his control, and
20 then about six weeks later, in January of '06, he diverted
21 another \$140,000 to his bank account under his control
22 totaling an additional \$430,000 of cash that were diverted
23 and Mr. Gonchar and I were left with that as part of our
24 guarantee.

25 Q. The \$200,000 you're referring to as relates to the

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1 loan, was there testimony in this courtroom regarding
2 monies received by Mr. Jowdy as relates to that loan?

3 A. Yes.

4 Q. Specifically the 200,000?

5 A. It was 290,000, and Mr. Rozenboom had confirmed that
6 that was transferred at the time of the November 14
7 signing to Mr. Jowdy's account.

8 Q. Mr. Kenner, I'm going to show you some more exhibits.

9 Kindly take a look at Kenner Exhibit 221 and
10 identify it?

11 A. This was a series of three Kenner Exhibits.

12 221 is a series of text messages that Bryan
13 Berard sent to me on June 1st, 2010, and June 2, 2010.

14 Q. And just for purposes of clarity of the record, those
15 text messages, without identifying the content as relates
16 to the allegations in the indictment, what alleged
17 fraudulent scheme do they reference?

18 A. These three text messages I received from Mr. Berard
19 are relevant to the Sag Harbor portion of the indictment.

20 Q. Would you kindly take a look at Kenner Exhibit 222
21 and identify that for us.

22 A. Kenner Exhibit 222 is a single text message that I
23 received from Bryan Berard on June 10th, 2010, referencing
24 the property in Sag Harbor that was owned at that time by
25 myself, John Kaiser and Bryan Berard.

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1 Mr. Berard was asking if we could use the
2 property that he identifies as owned by myself and John
3 Kaiser and him as collateral for a loan, a \$250,000 loan
4 at the time.

5 Q. Kindly take a look at a document marked Kenner
6 Exhibit 33.

7 A. Yes, sir.

8 Q. Do you know who created Kenner Exhibit 33?

9 A. I do not.

10 Q. Did you create Kenner Exhibit 33?

11 A. No, sir, I did not.

12 Q. At any point in time did you ever acquire knowledge
13 that John Kaiser claimed a 50 percent interest in Led
14 Better contrary to the Led Better operating agreement that
15 you testified to?

16 A. Yes, sir, I did.

17 Q. I'm going to show you what's Kenner Exhibit 34. I
18 believe this is already in evidence.

19 Do you recognize this document?

20 A. Yes, sir, I do.

21 Q. What is that?

22 A. This is a document dated March 1st, 2010, it's a
23 document that references John Kaiser and Bryan Berard
24 naming John Kaiser as the new managing member of Led
25 Better Development Company, and excluding me and releasing

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1 my friend Lauren Gillmore as the manager, which she was
2 not at the time.

3 It's dated March 1st, 2010 again and apparently
4 the meeting took place at John Kaiser's home in Setauket
5 New York.

6 This document purports to have been created
7 approximately three months before Mr. Berard is asking me,
8 on those previous text messages, about the property that
9 he, John Kaiser and I owned.

10 Q. The three documents I have shown you, Mr. Kenner,
11 Kenner Exhibits 221, 222 and 34 -- well, withdrawn.

12 The two documents I have shown you, Kenner
13 Exhibits 221 and Kenner Exhibit 222, are those true,
14 complete and accurate text messages sent to you by Bryan
15 Berard on the dates indicated on those documents?

16 A. Yes, sir, they are.

17 Q. And how did you acquire those documents?

18 A. They were originally on my iPhone and they were
19 turned over by the U.S. Government to you in pretrial, and
20 subsequently you turned them over to me for review.

21 Q. Mr. Kenner, I'm going to ask you to take a look at
22 Kenner Exhibit 232 for identification.

23 A. Yes, sir.

24 Q. And you testified previously on direct that there
25 came a point in time that you acquired knowledge that as

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1 you were discussing with Ken Jowdy Texas investments, you
2 learned that Ken Jowdy had used I believe the Falcon
3 aircraft to travel to Texas along with others; is that
4 correct?

5 A. Yes, sir, that's correct.

6 Q. Just tell us what is this document, Kenner Exhibit
7 232 for identification purposes?

8 A. Kenner Exhibit 232 is a passenger manifest that was
9 created by I believe Mark Thalmann at Diamante Air
10 representing a multi-leg trip on the Falcon 10 from Las
11 Vegas to Cabo San Lucas and back to Las Vegas over a four
12 day period of time with passengers including Ken Jowdy,
13 Robert Gaudet, Taffy Jowdy, Louie Freeh, Marilyn Freeh,
14 John Behnke, Fernando Garcia and Ken Ayers.

15 Q. I'm going to ask you to take a look at Kenner Exhibit
16 231. I'll ask you if you recognize this document?

17 A. Yes, sir, I do.

18 Q. What is it?

19 A. This was a letter dated September 23rd, 2009, written
20 by attorney Thomas Baker in Arizona with respect to the
21 ongoing litigation we had with Ken Jowdy as sued by Little
22 Isle IV, Ula Makika and myself, Phillip A. Kenner
23 personally, in the U.S. District Court, District of
24 Arizona, with respect to the approximate \$5 million loan
25 that was outstanding.

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1 In or about that time I had decided to change
2 legal counsel in the case and Mr. Baker was sending out
3 quite a detailed approximately seven page disclosure
4 letter to each of the members of Little Isle IV for their
5 acknowledgment and consent to continue the lawsuit against
6 Mr. Jowdy under his representation, and a number of those
7 individuals were copied on the letter.

8 Q. At that point in time, Mr. Kenner, approximately how
9 many civil lawsuits were pending as relates to the
10 disputes involving Ken Jowdy and your hockey player
11 clients, can you give us some idea?

12 A. In Mr. Baker's letter he --

13 MR. MISKIEWICZ: Objection to the contents of
14 the letter.

15 BY MR. HALEY:

16 Q. Mr. Kenner, my question to you is at that point in
17 time, when Mr. Baker sent that letter out, to your
18 knowledge, how many lawsuits were pending involving
19 disputes between yourself, Mr. Jowdy and your hockey
20 player clients?

21 A. Approximately 12 civil lawsuits.

22 Q. You testified on direct, Mr. Kenner, that there came
23 a point in time that, for lack of a better term, you and
24 Tommy Constantine parted ways; is that correct?

25 A. Yes, sir, that's correct.

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1 Q. At some point following the parting of ways did you
2 have an occasion to see Tommy Constantine in a Home Depot?

3 A. Yes, approximately five months after we were no
4 longer in communication there was an impromptu meeting at
5 a Home Depot in Scottsdale, Arizona.

6 Q. Would you tell us about how it happened to be an
7 impromptu meeting, what occurred?

8 A. I was walking into Home Depot on that particular day
9 in early August 2010 with my eight year old son.

10 And while we were walking through the parking
11 lot, Mr. Constantine pulled up next to me in a car with
12 his mother and told me he was very surprised to see me,
13 but he thought, because he did run into me, that after a
14 five or six month period of time of not speaking and a lot
15 of issues going back and forth between attorney Michael
16 Stolper's group and Mr. Constantine and his attorneys, he
17 thought it could benefit everybody if we spoke to one
18 another.

19 Q. So this impromptu meeting, by your testimony, was not
20 set up, you were surprised to see him?

21 A. Yes, sir.

22 Q. When he approached you what, if anything, did you do
23 with respect to your iPhone?

24 A. Well, initially, I told him I didn't think it was a
25 good idea to meet or to discuss anything because of the

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1 open case, and he said I really believe that we should.
2 There's a lot to talk about. We need to save this
3 company. So I said, all right, and I agreed to do so.

4 I believe Mr. Constantine and his mother took
5 their car and parked it somewhere in the parking lot and I
6 walked inside Home Depot with my son and I asked him to
7 just go entertain himself for a little while.

8 And I took my iPhone out, I put it on record,
9 and I placed it into my front pocket and I sat on a bench
10 just inside the front door of Home Depot and waited for
11 Mr. Constantine to enter.

12 Q. I take it, he was then unaware that you were
13 recording this conversation; is that correct?

14 A. That is correct, he was unaware.

15 Q. During the course of the conversation, does he accuse
16 you of some misconduct, Mr. Kenner?

17 A. The best that I could follow his representations,
18 yes.

19 Q. Was that related specifically to the Gaarn transfers?

20 A. Yes, sir, it was.

21 Q. Did you respond when he accused you of that
22 misconduct on that day?

23 A. I did not.

24 Q. Why not?

25 A. Mr. Constantine spoke perhaps without taking a breath

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1 almost the entire recording, and I just let him continue
2 to talk and talk and talk throughout the entire tape
3 regardless of what he was saying to me.

4 Q. Well, there were times when you did respond; is that
5 correct?

6 A. Several times, yes.

7 Q. Following that conversation with Mr. Kaiser, did you
8 destroy the tape?

9 THE COURT: Constantine.

10 MR. HALEY: Excuse me, Judge.

11 MR. HALEY: With Mr. Constantine.

12 Thank you, your Honor.

13 BY MR. HALEY:

14 Q. Did you destroy the tape?

15 A. No, sir, I did not.

16 Q. Did you discard your iPhone?

17 A. No, sir, I did not.

18 Q. What did you first do with the recording of your
19 conversation with Tommy Constantine following that
20 recording?

21 A. The first thing I did after I left the store at some
22 point in the next hour or two I believe I called our
23 attorney in New York, Michael Stolper, and I told him
24 about the impromptu meeting with Mr. Constantine.

25 He asked me what had transpired, and I gave him

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1 a synopsis of what I recalled at the time.

2 And I told him that I had made a recording on my
3 iPhone of that entire conversation.

4 So Mr. Stolper asked me if I could put it onto a
5 disk and send it to him so he could listen to it, and I
6 did that immediately.

7 Q. At the point in time you sent that recording to
8 Mr. Stolper, were you aware that Tommy Constantine was
9 making accusations against you regarding misconduct?

10 A. Yes, sir, I was.

11 Q. What was your understanding at that point in time
12 when you sent the recording to Mr. Stolper as to who, if
13 anyone, might then have access to the recording after you
14 conveyed it to Mr. Stolper?

15 A. I told Mr. Stolper he should share it with our group,
16 which were inclusive of all of the investors of Eufora,
17 specifically the individuals related to Mr. Gaarn's
18 private stock purchase, Mr. Constantine's private stock
19 purchase previous to that, and any other investors that
20 were involved with us in the litigation or investigation
21 efforts at that point in time.

22 Q. Other than providing -- that recording coming off
23 your iPhone to Mr. Stolper, did you provide, to your
24 knowledge, all or a portion of that recording to any other
25 person in any later point in time?

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1 A. Yes.

2 About two weeks later Mr. Berard -- I believe
3 Mr. Berard and Mr. Kaiser flew into Phoenix, Arizona, and
4 were staying with me for a couple of days.

5 And during that visit I let them listen to the
6 recording on my iPhone and I believe at that time
7 Mr. Kaiser made an additional copy for himself of the
8 recording of Mr. Constantine and I.

9 Q. At any point in time, Mr. Kenner, did you make any
10 attempts or efforts to destroy or alter that recording so
11 that it wouldn't see the day of light?

12 A. No, sir.

13 MR. HALEY: Your Honor, at this time, at this
14 point, I would offer into evidence a number of exhibits as
15 relates to those exhibits identified by my client with
16 reference to Hawaii, Eufora and Led Better.

17 I don't know if the Court's protocol is that I
18 do it in front of the jury or if the Court wants to see if
19 we can reach resolution between the parties.

20 THE COURT: Come to sidebar.

21 (Continued on next page.)
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1 (The following takes place at sidebar.)

2 THE COURT: I would suggest, to save time,
3 unless there's a problem doing it this way, that instead
4 of having a voir dire, for you to conduct your cross and
5 question him regarding authenticity and then you can move
6 them in following the crosses.

7 MR. LARUSSO: I know Mr. Miskiewicz is going
8 first. He will cover a lot of areas that I'll cover. I
9 agree. I will do my examination on those during regular
10 cross.

11 MR. MISKIEWICZ: That's fine.

12 I do have a question regarding the CD of the
13 Home Depot tape. We provided a copy to Mr. Haley's client
14 to review and initial so we would have a proper
15 foundation. If you have the CD or if that's what's you're
16 going to offer --

17 MR. LARUSSO: I will not object to your copy, if
18 that's what you want. Does that help?

19 MR. HALEY: Nor will I.

20 And actually from the point of expediency,
21 whether I offer it or you offer it, I think perhaps that's
22 academic. I'm not setup to play the darn thing, Judge.

23 MR. MISKIEWICZ: I'm referring to the fact that
24 typically a CD isn't obvious what's on there and normally
25 a witness would say I have listened to this and I know I

Kenner - Direct/Haley

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1 listened to this because I initialed it and dated it.

2 That's a logistical issue.

3 THE COURT: I assume there would be a
4 stipulation whatever copy you will use stipulate that's
5 the same recording, it's identical to the recording.

6 MR. HALEY: Yes.

7 MR. LARUSSO: Your Honor, I learned for the
8 first time today that Mr. Stolper may have the entire
9 conversation.

10 THE COURT: I was thinking about that.

11 MR. LARUSSO: They would have a better chance to
12 get it than I would.

13 THE COURT: I don't know.

14 MR. LARUSSO: Is it possible that the government
15 is going to reach out to Mr. Stolper and try and get the
16 entire recording? Otherwise, I'll have to do it on my
17 own. I was preparing witnesses tonight.

18 THE COURT: You can get a subpoena and subpoena
19 him for the recording.

20 MR. LARUSSO: I'll take it upon myself.

21 THE COURT: That would save two hours worth of
22 time.

23 MR. LARUSSO: I will try a phone call first.

24 MR. HALEY: In terms of the recording, do you
25 want to play it now?

Kenner - Direct/Haley

4578

1 MR. MISKIEWICZ: I was going to ask if I can
2 take the afternoon break before I begin my cross to setup
3 the recording.

4 THE COURT: That's fine.

5 MR. HALEY: Thank you.

6 (Continued on next page.)
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Kenner - Direct/Haley

4579

1 (The following takes place in open court.)

2 THE COURT: Members of the jury, we're going to
3 proceed with the government's cross.

4 And, Mr. Haley, the government can question
5 Mr. Kenner on those documents during their cross rather
6 than on voir dire which would add additional time. The
7 government will question Mr. Kenner as it wishes regarding
8 the documents that Mr. Haley wishes to offer, and
9 Mr. Haley can offer them at the conclusion of the cross.

10 We will let the government setup for cross and
11 we will take the afternoon break now.

12 Don't discuss the case.

13 (The jury is excused.)

14 (Recess taken.)

15 (After recess.)

16 THE CLERK: All rise.

17 THE COURT: Please be seated.

18 Let's bring in the jury.

19 THE CLERK: All rise.

20 (The jury is present.)

21 THE COURT: Please be seated.

22 MR. HALEY: Your Honor, I have no further
23 questions of Phil Kenner.

24 THE COURT: Okay.

25 Cross-examination, Mr. Miskiewicz.

Kenner - Cross/Miskiewicz

4580

1 MR. MISKIEWICZ: Thank you, your Honor.

2

3 DIRECT EXAMINATION

4 BY MR. MISKIEWICZ:

5 Q. Mr. Kenner.

6 A. Yes, sir.

7 Q. A phrase used in this trial a lot; we can agree, can
8 we not --

9 A. I'm sorry, I couldn't understand.

10 Q. You heard a phrase used repeatedly in this trial; we
11 can agree, can we not?

12 A. Yes, sir.

13 Q. I pose a question to you.

14 We can agree, can we not, that when you loaned
15 approximately \$5 million of hockey player money to Ken
16 Jowdy to be used in Mexico, you didn't intend to lose that
17 money, did you?

18 A. No, sir.

19 Q. You expected that it would be repaid?

20 A. Yes, sir, I expected it to be repaid at the close of
21 the Cabo San Lucas closing in March 2006.

22 Q. With interest?

23 A. Yes, sir, with interest.

24 Q. 15 percent interest?

25 A. 15 percent annual interest.

Kenner - Cross/Miskiewicz

4581

1 Q. And we can agree that this was a time when the real
2 estate market was just beginning to boom, correct?

3 A. I'm sorry, I'm having a hard time hearing you. Could
4 you please repeat that for me.

5 Q. Sure.

6 When you began loaning Mr. Jowdy money, the real
7 estate market in North America, around the world, was just
8 beginning to boom; is that correct?

9 A. I believe it was a very good time for real estate.

10 Q. I think you referred to this as an embryonic period
11 in that market?

12 A. I believe starting in and around 2002, that's
13 correct.

14 Q. When did you begin making what ultimately turned out
15 to be \$5 million worth of loans to Mr. Jowdy?

16 A. The first loans, loans from the Hawaii entities began
17 in November 2004.

18 Q. And was all of the \$5 million from the Hawaii
19 entities?

20 A. Yes.

21 There were other loans outside the \$5 million
22 that were also given to Mr. Jowdy and are still unpaid to
23 this day.

24 Q. You testified about giving a loan, having it signed,
25 or you referred to sometimes as a promissory note signed.

Kenner - Cross/Miskiewicz

4582

1 Is that in addition to the five million or does
2 that encompass what you're discussing now about more than
3 five million?

4 A. I'm sorry, I didn't understand the question.

5 Q. How much in total did you loan to Mr. Jowdy starting
6 in or about November 2004 out of hockey player money?

7 A. From our Hawaii entities the net total of loans were
8 in the neighborhood of five and a half million dollars and
9 there were a number of other individuals who loaned money
10 directly to Mr. Jowdy for similar terms that also remain
11 unpaid today to the tune of a couple million dollars.

12 Q. When you say other individuals, who are you referring
13 to?

14 A. I'm referring to Mattias Norstrom, Joseph Stumple,
15 Glenn Murray and Jere Lethinen.

16 Q. All of those were hockey players and they were all
17 clients of yours, weren't they?

18 A. Yes, sir, they were.

19 Q. Aren't you saying that they loaned money directly to
20 Mr. Jowdy, not through one of your Hawaii entities?

21 A. That is correct.

22 Q. Not through the lines of credit?

23 A. That is correct.

24 Q. Did you have any role in arranging for those loans?

25 A. Yes.

Kenner - Cross/Miskiewicz

4583

1 I originally introduced Mr. Jowdy to the
2 individuals who made those loans.

3 Q. Was that documented somehow, the loan itself?

4 A. The original loan with Mattias Norstrom was for
5 \$500,000 in the summer 2004.

6 When Mr. Jowdy originally requested that loan,
7 he and his father met with me and told me they were going
8 to send me a check for \$500,000 in the mail, which in fact
9 they did, to memorialize the repayment of the loan which
10 --

11 Q. Mr. Kenner, I'm going to ask you to please answer the
12 question.

13 Did that loan get documented in any fashion?

14 A. Mr. Norstrom's loan was documented through the check
15 that Mr. Jowdy and his father delivered to us.

16 Q. Just a check?

17 A. As described by Mr. Jowdy and his father.

18 Q. I'm not asking you to describe Mr. Jowdy.

19 I'm asking you, you were their financial advisor
20 at the time. You said you played a role of some kind to
21 initiate them into this loan.

22 What was the documentation? Was there
23 documentation about the loan?

24 I heard you said there was a check. Fine.
25 Beyond the check, what was it?

Kenner - Cross/Miskiewicz

4584

1 A. For Mr. Norstrom there was nothing else.

2 Q. What about Mr. Stumple?

3 A. For Mr. Stumple there was just the wire transfer
4 documents of \$1.6 million directly to Mr. Jowdy's company
5 in Mexico.

6 (Continued on next page.)

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Kenner - Cross/Miskiewicz

4585

1 BY MR. MISKIEWICZ (Cont'd):

2 Q. What about Mr. Lethinen?

3 A. Yes, there was a letter that Mr. Jowdy had prepared
4 for Mr. Lethinen and there was e-mail traffic in evidence
5 that I reviewed pretrial between Mr. Najam, Mr. Jowdy and
6 myself referring to the letter that ultimately was written
7 by Mr. Jowdy.

8 Q. What letter are you referring to?

9 A. The --

10 Q. Go ahead?

11 A. There was a letter prepared by Mr. Jowdy and typed by
12 his assistant, Sean Hughes and then delivered to myself
13 and Mr. Lethinen as an acknowledgment of the \$1.5 million
14 loan that Mr. Jowdy took from him on a 30-day, 10 percent
15 return.

16 Q. You have a copy of that?

17 A. Not on me right here, but it is in evidence, I have
18 seen it.

19 Q. And Glenn Murray, what documentation was there for
20 the loan that you had arranged to Mr. Jowdy?

21 A. There was no documentation other than the wire
22 transfer and bank statements that showed the money going
23 from Mr. Murray's account directly to Mr. Jowdy's escrow
24 accounts in Las Vegas and the subsequent lawsuit that
25 Mr. Murray won the million judgment on.

Kenner - Cross/Miskiewicz

4586

1 Q. You were the financial advisor for the hockey
2 players.

3 Obviously you took it upon yourself to treat and
4 be careful with your money, correct?

5 A. Yes, sir.

6 Q. Documentation of lending and borrowing of money is
7 kind of important, isn't it?

8 A. I would agree.

9 Q. You have testified that you reviewed in anticipation
10 of your testimony today prior to the trial some two
11 million documents that were turned over to you from the
12 government.

13 Do you remember testifying that that I believe
14 Wednesday?

15 A. I believe so, yes.

16 Q. And isn't it true, sir, that most of those two
17 million documents were documents that you generated over
18 years prior to the indictment in this case?

19 A. I don't believe that's true.

20 Q. Isn't it true, sir, that there were some 89,000 text
21 messages on your telephone, on your iPhone?

22 A. Yes, sir, that's correct.

23 Q. There were recovered from your home in Scottsdale,
24 Arizona, 17,316 documents from your home?

25 A. I believe there were more than that.

Kenner - Cross/Miskiewicz

4587

1 Q. You think there were more than that?

2 A. Yes.

3 Q. More than 17,000 documents from your home?

4 A. Yes, sir, I believe so.

5 Q. Okay.

6 On your computer there were over 287,000
7 documents in electronic form.

8 Would you say that's about right or it could
9 have been higher or lower?

10 A. No. That sounds accurate, and I was referring in my
11 previous answer to the accumulation of both of those sets.

12 I apologize.

13 Q. Well, my question is, is it correct, sir, that there
14 were 287,000 documents recovered from your laptop, your
15 iPad which is device No. 1?

16 A. I believe that's accurate.

17 Q. The government also produced, gave back to you
18 documents that you had produced in prior litigation, for
19 instance, some 26,000 pages of documents that you have
20 provided to the United States Securities and Exchange
21 Commission.

22 Is that correct?

23 A. That sounds about accurate.

24 Q. Boxes and boxes of material contained on disks from
25 the Owen Nolan arbitration and other lawsuits.

Kenner - Cross/Miskiewicz

4588

1 Correct?

2 A. I believe that's correct as well.

3 Q. You understand that the indictment in this case does
4 not blame you for losing money in a risky venture.

5 Right?

6 A. That's my understanding.

7 Q. You understand that the indictment charges you with
8 stealing money from your clients, correct?

9 A. That's my understanding.

10 Q. So the fact that Lehman Brothers went belly up, that
11 the great recession happened, the real estate market
12 bubble burst, you understand there's nothing in the
13 indictment that blames you for that, right?

14 A. I understand that.

15 Q. The indictment charges you with, among other things,
16 diverting money belonging to your clients through the
17 lines of credit to Mexico, to this guy Mr. Jowdy.

18 You understand that?

19 A. Not specifically.

20 Q. You don't understand that that's what part of what
21 you are charged with?

22 A. I don't recall that specifically.

23 Q. Well, in any event, during this period of time, sir,
24 that you have been testifying about, you had a number of
25 limited liability companies open, correct?

Kenner - Cross/Miskiewicz

4589

1 A. Yes, sir, that's correct.

2 Q. How many?

3 Can you even approximate how many LLCs you
4 created during the period of time encompassed in the
5 indictment?

6 A. My best guess would be between 15 and 20 LLCs.

7 Q. And I think you testified on direct, but in case you
8 hadn't and I'll just ask it what is an LLC?

9 Why do you have an LLC?

10 A. There are a number of business purposes in my opinion
11 for an LLC.

12 But it's specifically referred to as a limited
13 liability corporation, would typically be established for
14 business purposes and specific to what we needed in
15 Hawaii, I opened up an LLC for the parent company at the
16 time in 2003 known as Little Isle IV.

17 Subsequent to that, on each of the individual
18 land purchases for little Honu'Apo, the 258 acres, I
19 opened up Big Isle IV, for the 1,500 parcels at Honu'Apo I
20 opened up Big Isle V, I opened up for the Waikapuna
21 parcel, purchase and sale contract I opened up
22 Big Isle VI --

23 Q. If I may, I'm going to stop you.

24 My question was why you open up LLCs. I think
25 you have explained that.

Kenner - Cross/Miskiewicz

4590

1 A. In the --

2 Q. There is no question you opened up a lot of them,
3 correct?

4 A. Yes, sir.

5 And the specific purpose for each of those
6 parcels was to not put any of the individual parcels at
7 risk in case there was an event adverse to the overall
8 acquisitions in Hawaii, to separate one from another.

9 And I think that's only prudent.

10 Q. And each one of those LLCs had what's referred to,
11 what's been referred to numerous times in this trial as a
12 managing partner.

13 Right?

14 A. Yes, sir.

15 Q. LLCs, unlike corporations, don't issue stock.

16 You have what's called an operating agreement
17 and that operating agreement is pretty much identified as
18 who or what is part of that LLC, correct?

19 A. That is correct.

20 Q. Could be a person, could be another LLC that owns a
21 percentage of a parent LLC, so on and so forth.

22 Correct?

23 A. I have even those occurrences.

24 Q. We have all seen a lot of those at trial, you
25 introduced a lot of them in your direct.

Kenner - Cross/Miskiewicz

4591

1 My question to you is, in each one of the LLCs,
2 let's focus on Hawaii for now, you were the managing
3 partner, weren't you?

4 A. Yes, sir, for each one of the LLCs I was the managing
5 partner.

6 Q. And in each instance, not only were you the managing
7 partner, you were the signatory and the sole signatory on
8 bank accounts opened for each one of those LLCs?

9 A. As the managing partner I was the sole signatory on
10 each one of them.

11 That's correct.

12 Q. You may have had other members, but whatever other
13 membership there was in any one of your LLCs, they didn't
14 control the bank accounts, did they?

15 A. No, sir, I controlled the bank accounts.

16 Q. You controlled all of the bank accounts relative to
17 the Hawaii land venture, or real estate deal, however you
18 want to call it.

19 A. I controlled the majority of them.

20 Q. The majority?

21 A. Yes, sir.

22 There were some operating accounts that were
23 handled by Mr. Manfredi on the Big Island for day to day
24 month to month operational expenses.

25 Q. Other than those, though, you controlled all of the

Kenner - Cross/Miskiewicz

4592

1 operating accounts -- I'm sorry -- all of the LLCs bank
2 accounts that we have heard of relative to the Hawaii real
3 estate venture, in other words for Big Isle IV, Ula
4 Makika, on and on.

5 Correct?

6 A. For the ones you just mentioned, yes, that's correct.

7 Q. You also received copies of all of the lines of
8 credit statements that were generated when lines of credit
9 were opened in 2004, correct?

10 A. I'm not sure what statements you are referring to.

11 Q. Monthly statements.

12 A. No, sir.

13 Q. You didn't get any monthly statements?

14 A. I don't believe monthly statements began to be issued
15 by Northern Trust Bank on the individual lines of credit
16 until sometime in 2006.

17 Q. What about the transaction history reports that go
18 back to the inception of each one of the lines of credit?

19 They were found in your home?

20 A. Yes, sir, they were.

21 Q. You had those?

22 A. Those were received in late 2009 after each of the
23 line of credit holders had signed the individual requests
24 to Northern Trust Bank to receive duplicate copies of all
25 the statements.

Kenner - Cross/Miskiewicz

4593

1 Those loan transaction history reports, the
2 first time I ever saw those were at the end of 2009 when
3 we received those statements and I made copies of all for
4 the clients when they were all received.

5 Q. I see.

6 So you got them when the various hockey players
7 started getting letters of default notifying them that
8 they owed a million or more in each case to Northern
9 Trust.

10 A. No, sir, that's incorrect.

11 Q. When did you get those transaction reports?

12 A. After about August of 2009, approximately six months
13 after the closure of those lines of credit.

14 Q. I'm confused.

15 You saw the very first week of trial Kristin
16 Peca testified here and she played a portion of a
17 recording.

18 Do you remember a recording she made of you?

19 A. I certainly remember the recording she made of me.

20 It was four hours and 56 minutes.

21 Q. And she asked you in that recording, where could she
22 find documents reflecting where her money went from the
23 line of credit and you said, I don't have any.

24 You said that.

25 A. I recall that.

Kenner - Cross/Miskiewicz

4594

1 Q. That wasn't 2009 that recording?

2 A. No, it was 2012.

3 Q. So you lied to her?

4 A. That's not true.

5 Q. You had the records in your house, but you told her
6 in 2012, I don't have any records. Go to Northern Trust
7 and find them.

8 Isn't that what you said?

9 A. That's correct, in 2012 I told her to go to Northern
10 Trust, get the documents and trace the money.

11 Q. Back to the LLCs and the two million pages in records
12 that you have reviewed, you claim that there was a note,
13 promissory note, a loan agreement to Kenneth Jowdy
14 documenting how you on behalf of the player clients would
15 lend him millions of dollars, what turned out to be over
16 \$5 million, correct?

17 A. It was a revolving line of credit document that
18 Mr. Jowdy and myself signed with a witness.

19 Q. In Mexico?

20 A. In Mexico in December of 2004.

21 Q. And you claim that based on that you had not only the
22 authority to collect on that loan, but all of the players
23 were aware that you had made such a loan contemporaneous
24 with the signing of that note?

25 A. They were all made aware that there was a potential

Kenner - Cross/Miskiewicz

4595

1 to loan money sometime between the summer of 2004 and
2 November of 2004.

3 And they were all made aware that the document
4 had been signed and was in the possession of Mr. Kaiser
5 from that point forward.

6 Q. How were they made aware?

7 A. I let them know in face to face meetings with them.

8 Q. So when two million pages of records, most of them
9 yours, there is not a letter, not a text, not an e-mail
10 contemporaneously of you notifying all of the hockey
11 players that you were loaning money to Ken Jowdy?

12 A. In 2004 I did not have a text message or an e-mail
13 relationship with my clients.

14 I spoke with them on the phone and I traveled
15 approximately 250 plus days a year to meet with them face
16 to face.

17 Q. Well, you kept the original documentation, didn't
18 you, regarding the taking of the line of credit, right?

19 A. I'm not sure I understood the question.

20 Q. You introduced pledge agreements and other things
21 like that regarding each player's line of credit.

22 A. I saw those introduced during the trial, that's
23 correct.

24 Q. You have all those documents with you?

25 A. With me at what point in time?

Kenner - Cross/Miskiewicz

4596

1 Q. In your house, prior to your arrest, in various
2 pieces of litigation you produced those documents.

3 Correct?

4 MR. HALEY: Judge, I would just object to the
5 compound nature of the question.

6 That's my only objection.

7 THE COURT: Sustained as to form.

8 BY MR. MISKIEWICZ:

9 Q. You have those documents in your house?

10 MR. HALEY: Again -- I'll withdraw the
11 objection, Judge.

12 A. I believe a good portion of those documents were
13 either electronically stored at my house or this paper
14 form.

15 Q. It was important to keep those notes because they
16 articulate the responsibilities of your players were
17 taking on in terms of borrowing money against what you
18 heard in some cases was their retirement account.

19 Right?

20 A. I'm not sure I understood that statement.

21 Q. It was important to keep that paper?

22 A. I attempted to keep as much paperwork for my client
23 accounts as I could.

24 Q. And among the things you also kept were operating
25 agreements for your various LLCs, right?

Kenner - Cross/Miskiewicz

4597

1 A. I believe that's correct as well.

2 Q. But no paper documenting that Little Isle IV and its
3 various subsidiaries was making a loan to Ken Jowdy in
4 Mexico, had nothing to do with Hawaii, no paper like that
5 in the two million documents that you looked at?

6 A. That's incorrect.

7 Q. There is a document, isn't there?

8 A. Yes, sir, there is.

9 Q. And that would be the promissory note that you say
10 Ken Jowdy signed with you in Cabo San Lucas.

11 Right?

12 A. That is correct.

13 That is the document that he not only received
14 the loans, but under the terms of which repayment was
15 approximately \$2 million over an 18-month period of time.

16 Q. So you would agree with me, Mr. Kenner, that if that
17 loan document proves to this jury to be phony, everything
18 you have said in your direct testimony about money going
19 to Mexico and not being stolen is a lie?

20 A. I'm not --

21 MR. HALEY: Judge, is that a question or is that
22 a summation?

23 I object as to form.

24 THE COURT: Sustained as to form.

25 No speaking objections, okay.

Kenner - Cross/Miskiewicz

4598

1 MR. HALEY: Thank you.

2 THE COURT: Sustained as to form.

3 BY MR. MISKIEWICZ:

4 Q. Well, there is no record, no document that shows any
5 player knew anything about the Jowdy loan except for the
6 one document you produced and offered into evidence during
7 your direct.

8 Correct?

9 A. That in fact would be the loan agreement with
10 Mr. Jowdy.

11 Q. And if that loan document proves to be phony, then
12 you are lying.

13 Correct?

14 MR. HALEY: I object to the form.

15 THE COURT: Sustained as to form.

16 BY MR. MISKIEWICZ:

17 Q. You have no -- your testimony is that the loan
18 document that is now in evidence as a Kenner exhibit is
19 true and accurate.

20 Correct?

21 A. Yes, sir, it is.

22 Q. Kenner 214 is the document that you have been
23 referring to.

24 I know it's kind of small and we don't have to
25 read the entire thing, but so we know what we are talking

Kenner - Cross/Miskiewicz

4599

1 about, can you tell from the screen what I'm referring to?

2 A. Yes, sir, I can.

3 Q. This is the document, correct?

4 A. The revolving line of credit, loans.

5 Q. And at the end here there are a number of signatures,
6 one of which I guess purports to be Kenneth Aboud Jowdy,
7 correct?

8 THE COURT: It's not on the seen.

9 BY MR. MISKIEWICZ:

10 Q. One of these signatures purport to be Mr. Jowdy's
11 signature, right?

12 A. Yes, that's correct.

13 Q. And you have used this document, or you have relied
14 on this document as substantiation or proof that you made
15 a loan at a certain percentage, I think it says here 15
16 percent, to Mr. Jowdy and that you withdrew that money
17 from the lines of credit in part.

18 Right?

19 A. In part.

20 Q. Did you ever provide copies of this document to any
21 of your hockey player clients contemporaneous with the
22 signing of the document, that is on or about December of
23 '04?

24 A. I don't believe so.

25 Mr. Kaiser ended up with a copy of the document.

Kenner - Cross/Miskiewicz

4600

1 Q. And so did you.

2 A. No.

3 Mr. Kaiser ended up with a copy of the document
4 that I had at his request.

5 Q. But you also retained a copy of the document.

6 A. No, I don't believe I did.

7 Q. Wait, you went to Cabo San Lucas.

8 You met with Mr. Jowdy -- I'm sorry -- did you
9 say Kaiser or Jowdy retained a copy?

10 A. Actually they both did.

11 Q. Who had the original?

12 A. I believe Mr. Jowdy had the original.

13 Q. And he kept the original when this was signed?

14 A. Yes, sir.

15 Q. You didn't bring a second copy to sign?

16 A. I didn't think about it at the time.

17 Q. You are at this point well on in your career as a
18 financial advisor, were you not?

19 I mean, it's 2004, you started as a financial
20 advisor in the late 1990s.

21 A. Early 1990s, about one decade.

22 Q. You didn't think it was important to have an original
23 of a promissory note in which -- it's not your money, you
24 are loaning other people's money to this guy in Mexico.

25 You didn't think it was necessary to retain an

Kenner - Cross/Miskiewicz

4601

1 original?

2 A. At the time I had probably dealt with dozens of bank
3 loans and never retained a single original signature of
4 any of the bank loans for any of my clients.

5 And, subsequent to that, this loan was never
6 intended to grow to the size that it did. In fact,
7 originally it was frankly documenting about a quarter
8 million dollar loan that had already been given to
9 Mr. Jowdy in an oral agreement in 2004.

10 Q. So you didn't retain a copy, but your testimony is
11 you made a copy down in Cabo San Lucas and then you came
12 home with it.

13 Is that what you are saying?

14 A. No.

15 Mr. Jowdy made a copy and handed it to me.

16 Q. So you couldn't make a copy of the unsigned copy so
17 you would have retained an original, you didn't do that,
18 right?

19 A. No, sir.

20 Q. And you know from prior litigation that you testified
21 about whether or not this was a forgery, you said that
22 Mr. Kaiser, I think you attributed to Mr. Kaiser he lied
23 when he said that this was a forgery.

24 Correct?

25 A. I couldn't hear the question.

Kenner - Cross/Miskiewicz

4602

1 I'm sorry.

2 Q. Did you or did you not testify back on last
3 Wednesday, I believe, that when Mr. Kaiser said that this
4 document was a forgery, that he was lying about that?

5 A. I think what I said is Mr. Kaiser -- it was untrue
6 when he said that I represented to him that the Arizona
7 case was dismissed because of this document was a forgery.

8 Q. Are you saying the case wasn't dismissed because it
9 was a forgery?

10 A. That's correct.

11 The case was not dismissed because of anything
12 to do with that document.

13 Q. Well, this document played a significant role in a
14 piece of litigation that you were involved in in Nevada,
15 right?

16 A. It also played a part --

17 Q. Sir --

18 A. In the --

19 Q. I'm just going to ask you -- if I misspeak, you will
20 have an opportunity during redirect to clarify anything.

21 But isn't it true, sir, that this was an
22 important document during your litigation in Nevada over
23 whether or not Ken Jowdy owed you or your players \$5
24 million?

25 A. That is not true.

Kenner - Cross/Miskiewicz

4603

1 Q. Didn't you on behalf of Little Isle LLC and Ula
2 Makika sue first in state court -- I said Nevada, I
3 misspoke -- Arizona, seeking to get payment for the \$5
4 million that you contend that Mr. Jowdy owed you?

5 A. Yes, in addition I sued him personally for \$500,000
6 that he also reneged on me at the time.

7 Q. My question is, did you sue him in state court in
8 Nevada -- I'm sorry -- in Arizona to get repayment on what
9 is now Kenner 214, the revolving line of credit loan
10 agreement?

11 A. I don't recall if it was state or federal court in
12 Arizona.

13 But, yes, the lawsuit was filed in Arizona.

14 Q. Well, eventually it did become transferred or it
15 eventually was in United States District Court in Arizona.

16 Correct -- the lawsuit?

17 A. I don't recall.

18 I know that Mr. Jowdy spent a lot of time and
19 energy and money to move the case around.

20 Q. You recall that?

21 A. Yes, I do recall that because it cost me a lot of
22 money personally.

23 Q. I'm going to show you what is marked as
24 Government Exhibit 9080 C for identification.

25 I ask you to look at that document.

Kenner - Cross/Miskiewicz

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1 MR. MISKIEWICZ: Your Honor, we also move for
2 the admission of 9080 C as a self-authenticating document
3 from the District Court of Arizona.

4 If the court wishes to inspect the seal, we have
5 it available.

6 THE COURT: Does Mr. Haley have a copy?

7 MR. HALEY: Your Honor, I'm pretty sure I know
8 what it is.

9 There may be no objection, if I may review it.
10 (There was a pause in the proceedings.)

11 MR. HALEY: I do object, Judge.

12 THE COURT: You want to approach.

13 (Continued on next page.)
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Kenner - Cross/Miskiewicz

4605

1 (Sidebar.)

2 MR. MISKIEWICZ: Your Honor, specifically the
3 United States District Judge who was assigned the case
4 concluded -- made a number of findings of fact, but
5 concluded that, among other things, that the plaintiff's
6 failure to comply with various court orders, the plaintiff
7 in this case being Mr. Kenner, his failures to respond
8 also lends credence to the claims of forgery and false
9 claim, to Nevada citizenship.

10 This was a lawsuit first initiated in state
11 court to defeat diversity of citizenship the defendant
12 made a number of false claims about his residence,
13 something that came out in one of the earlier bail
14 hearings in this matter. He testified on direct and he
15 just reiterated that Mr. Kaiser was lying when he said
16 that Mr. Kenner admitted to him that the case was
17 dismissed because of a forged promissory note, and the
18 note, I would proffer, is exactly what the district court
19 is referring to here as the forgery.

20 I didn't --

21 THE COURT: If you want to read that portion of
22 the order that makes reference to that I think that's
23 proper impeachment, but not the whole order.

24 MR. MISKIEWICZ: That's fine.

25 MR. HALEY: Well, it depends upon I guess the

Kenner - Cross/Miskiewicz

4606

1 way the question is phrased, Judge.

2 If it's did you receive an order -- I'll hear
3 the question then I'll reserve my right.

4 THE COURT: I don't want to have another
5 sidebar.

6 The portion of this relates to the fact that the
7 judge relied upon that document in connection with this
8 case, is that what you are saying?

9 MR. MISKIEWICZ: Mr. Jowdy's defense was that he
10 never signed such a promissory note which is now in
11 evidence as a Kenner exhibit and that it was a forgery.

12 There were a series of failures to respond to
13 court orders to appear for deposition, to provide
14 expedited discovery, et cetera, et cetera, and the failure
15 to do so, ultimately, led to the dismissal of the case
16 because in part of the failure to provide any
17 documentation substantiating the claim that this was an
18 authentic document, and also in doing so the court, as I
19 just read, concluded that she believed that the evidence
20 of forgery was also proven by the defendant's behavior,
21 the plaintiff there, defendant here.

22 MR. HALEY: Judge --

23 THE COURT: Hold on.

24 It's 4:15. I have to read this order. I will
25 tell you to move on to another area and we'll come back to

Kenner - Cross/Miskiewicz

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1 this.

2 MR. MISKIEWICZ: Okay.

3 MR. HALEY: Thank you, Judge.

4 (Sidebar concluded.)

5 (Continued on next page.)

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Kenner - Cross/Miskiewicz

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1 (In open court.)

2 THE COURT: Members of the jury, I have to read
3 this document.

4 The government will move on to another area and
5 I'll discuss it with them after.

6 BY MR. MISKIEWICZ:

7 Q. Sir, over what period of time did you lend hockey
8 player money to Ken Jowdy?

9 I think we got the start date of November of
10 2004. How long did that continue?

11 A. To on or about February of 2006.

12 Q. And then in July of 2006, specifically July 21, 2006,
13 there is a letter, rather long memo that's in evidence,
14 both as a government and I think Kenner exhibit,
15 articulating what was about to happen with respect to the
16 acquisition of parcels, the formation of Naalehu Ventures,
17 the upcoming Lehman loan.

18 You know the document I'm referring to?

19 A. Yes, the overview of the joint venture agreement.

20 Q. Okay.

21 And in this first page, you articulate and you
22 wrote this document, didn't you?

23 A. No, sir.

24 Q. Who wrote it?

25 A. The letter was written by our legal counsel, Larry

Kenner - Cross/Miskiewicz

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1 Markowitz, with the help of Bill Najam.

2 Q. So it says very truly yours Phillip A. Kenner?

3 A. Yes, sir, it does, at the end.

4 Q. But you got help from counsel drafting this document?

5 A. This was a letter that Lehman Brothers required, that
6 we have written and signed by each one of the clients --
7 members of Little Isle IV.

8 And Larry Markowitz, our general counsel was
9 instructed by Lehman Brothers attorneys formulated this
10 letter.

11 MR. MISKIEWICZ: I just want to approach counsel
12 to get the stamped copy.

13 MR. HALEY: Sure.

14 BY MR. MISKIEWICZ:

15 Q. For the record I'm showing you --

16 MR. HALEY: One moment, your Honor.

17 BY MR. MISKIEWICZ:

18 Q. For the record, I'm showing you what's been marked as
19 Kenner Exhibit 16 in evidence.

20 That's the document you were talking about,
21 correct?

22 A. Yes, sir.

23 Q. This Kenner Exhibit 16 also has at the end of it a
24 number of what are referred to as acknowledgment or
25 response forms.

Kenner - Cross/Miskiewicz

4610

1 Right?

2 A. That is correct.

3 Q. And --

4 A. One --

5 Q. And these were signed by various player clients of
6 yours, for instance this one says Tyson Nash?

7 A. Yes, sir, I believe they were signed by each one of
8 the members of Little Isle IV as required by
9 Lehman Brothers.

10 Q. Norstrom, Peca, Rucchin.

11 We haven't heard of that guy, Chris Simon, who's
12 he?

13 A. He was one of my clients at the time.

14 Q. Turner Stevenson, et cetera.

15 Now, in this document -- you testified in your
16 direct that there was a total of -- I'm showing you now
17 Kenner Exhibit 215 -- but there was a total of \$13 million
18 collected through Little Isle IV from various player
19 clients as well as Mr. Kaiser.

20 Did this include money from the lines of credit,
21 this \$13 million?

22 A. Yes, sir, it did.

23 Q. Why don't you make any mention of the \$13 million in
24 your letter to the members of Little Isle IV right here on
25 the first page?

Kenner - Cross/Miskiewicz

4611

1 Why did you cut out \$5 million?

2 A. The letter that went out to the Little Isle IV
3 members was a state of the union letter for Little Isle
4 IV.

5 Moreover, it was a letter that was drafted to
6 memorialize the joint venture that was occurring with
7 Windwalker at Lehman Brothers.

8 Q. You are going to have to explain that to me.

9 What is a state of the union letter?

10 MR. HALEY: Judge, if I can, the comment --

11 MR. MISKIEWICZ: I'll withdraw the commentary.

12 MR. HALEY: Thank you.

13 BY MR. MISKIEWICZ:

14 Q. What is a state of the union letter?

15 A. I would consider it something different than a
16 memorialization letter that was written on behalf of
17 Little Isle IV to all the members to let them know what
18 was going on in the joint venture proposal between
19 Windwalker, Lehman Brothers and our entities.

20 Q. Well, sir, I would imagine it was important when you
21 put together this chart to document how much was collected
22 because, after all, this is part of your defense that you
23 didn't steal any money and what you came up with was \$13
24 million.

25 Correct?

Kenner - Cross/Miskiewicz

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1 MR. HALEY: I object as to form, Judge.

2 THE COURT: Sustained as to form.

3 BY MR. MISKIEWICZ:

4 Q. Wasn't it important to you when you calculated that
5 the total amount from the player clients was \$13 million?

6 A. Wasn't it important?

7 Q. Yes.

8 A. In what context?

9 Q. In this context, sir.

10 A. I'm not sure I understand.

11 That's why I'm asking. I apologize.

12 Q. Prior to testimony here in this federal trial in
13 which you were charged with certain crimes, it was
14 important for you to say that it was a \$13 million
15 collection of capital.

16 Isn't that true?

17 A. I'm not sure I understand the question, but I can
18 confirm that between my client --

19 Q. You know what, if you don't understand the question,
20 I'll rephrase it.

21 You created or helped create Exhibit 215,
22 correct?

23 A. Yes, sir, that's correct.

24 Q. And you put in here that you collected approximately
25 \$13 million in capital from your various player clients,

Kenner - Cross/Miskiewicz

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1 also known as the John Does in this indictment.

2 Correct?

3 A. Including other people, including myself and John
4 Kaiser as well.

5 Q. And when you were writing to your player clients,
6 many of whom testified here today, you did not say that
7 the total investment to date of the company, our partners
8 and me and the parcels is approximately \$8 million, you
9 didn't say \$15 million, you said \$8 million.

10 You cut \$5 million out of that number, didn't
11 you?

12 A. No, sir, because if I had put \$15 million that would
13 have suggested -- or \$13 million, that would make it an
14 inaccurate statement.

15 Q. Sir, isn't it true you cut \$5 million out of here
16 because in 2006 nobody but you knew Ken Jowdy borrowed
17 that money and you couldn't tell them in this document
18 because they would ask you, Ken who?

19 Isn't that true?

20 A. That is untrue.

21 Q. Also 2006, this loan has been building and building
22 and hasn't been repaid, correct?

23 Did he pay any money to you up to that point in
24 2006?

25 A. Yes.

Kenner - Cross/Miskiewicz

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1 Mr. Jowdy had made a series of payments totaling
2 approximately \$2 million and in the month and a half prior
3 to the Lehman Brothers closing in Cabo San Lucas when he
4 was supposed to repay the balance which was approximately
5 \$7 million including interest, Mr. Jowdy made a series of
6 about seven payments totaling over a quarter million
7 dollars as he was seeking the rest of our signatures for
8 the closing of the Cabo San Lucas deal.

9 Three days before the closing of the Cabo deal
10 was the last repayment by Mr. Jowdy and he hasn't paid us
11 anything since.

12 Q. I'm going to use the phrase again, I apologize, I
13 just like it.

14 We can agree, sir, that in various litigation
15 that you commenced against Mr. Jowdy subsequent to this
16 letter, you alleged that he owed your players \$5 million,
17 right?

18 A. I alleged that in the Arizona lawsuit.

19 That's correct.

20 Q. Okay.

21 So whether the money went up or down, bottom
22 line is, you didn't include anything, anything about how
23 much Mr. Jowdy owed Little Isle IV in 2006, did you?

24 A. Not in that letter.

25 It was not relevant to the purpose of that

Kenner - Cross/Miskiewicz

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1 letter.

2 Q. Do you remember what you said about Mr. Jowdy in this
3 letter?

4 A. I don't recall off the top of my head.

5 Q. While I look for the particular paragraph, would you
6 disagree that you said -- and this letter is going out to
7 your player clients -- Mr. Jowdy has provided value
8 assistance in the acquisition of a Lehman loan for the
9 Hawaii venture?

10 Did you say that in this letter?

11 A. Could you show me the letter to refresh my
12 recollection, please.

13 Q. I'll have to come back to it.

14 Let me ask you another question, JND, you know
15 what JND is, who owns JND?

16 A. I believe that was an entity that Bill Najam set up
17 for Ken Jowdy and Bill Najam to take some ownership in the
18 Hawaii project at that time.

19 Q. And at page two of Kenner 16, there is a discussion
20 of JN Development, LLC and this is the bullet point of the
21 paragraph.

22 Could you read what it says in the second
23 sentence of that paragraph?

24 A. Yes.

25 Ken and Bill were instrumental in obtaining

Kenner - Cross/Miskiewicz

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1 Lehman's loan commitment and Bill is actively involved in
2 bringing this transaction to completion.

3 Q. So in 2006 you do tell the players, the other members
4 of Little Isle IV, about essentially how helpful Mr. Jowdy
5 has been to getting Lehman, and Lehman was fundamental,
6 correct?

7 A. And Lehman was?

8 Q. Fundamental for the success of the project.

9 A. Lehman Brothers was the lending institution, that's
10 correct.

11 Q. And you are attributing the success to getting
12 Lehman Brothers to the table to loan the amount of money
13 that was necessary to do the Hawaii development, you are
14 attributing that to Mr. Jowdy, as well as some other of
15 his partners in JND, correct?

16 A. Well, his partners in JN Development was himself and
17 Bill Najam.

18 Q. My question is in that document to the players, you
19 are attributing this important event, getting this huge
20 loan from Lehman, to the help received, in part, through
21 Ken Jowdy and Bill Najam.

22 Correct?

23 A. That's how it was written by Mr. Markowitz and
24 Mr. Najam, correct.

25 Q. But you put your name to it, correct, sir?

Kenner - Cross/Miskiewicz

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1 A. Yes, sir, I did.

2 Q. But, again, you didn't mention anything about in this
3 paragraph, by the way, in sum and substance, they still
4 owe us \$5 million.

5 Right?

6 A. No.

7 It wasn't relevant to the purpose of the letter.

8 Q. But, nevertheless, on the next page, page three of
9 Kenner 16, it says here JND now backs a 5 percent member
10 of Little Isle IV, and everything that comes along with
11 Little Isle IV.

12 Right?

13 A. No, sir.

14 Q. JND -- does it not say that?

15 The equity ownership of Naalehu, which as you
16 testified is the company that Little Isle and everything
17 else is going to get wrapped up into, 5 percent of that
18 company is now going to be owned by JND, Ken Jowdy and
19 Bill Najam?

20 A. 5 percent of Naalehu Ventures 2006, that is correct.

21 Q. And basically that's 5 percent of the whole Hawaii
22 project, right?

23 A. That's 2 and a half percent of the total Hawaii
24 project at that point in time.

25 Q. Worth millions, potentially, if everything worked

Kenner - Cross/Miskiewicz

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1 out?

2 A. I would have hoped so, yes.

3 Q. And the only reason you cut him in is because he cut
4 you in on Cabo San Lucas.

5 A. That is incorrect.

6 Q. You own 39 percent of Diamante Cabo San Lucas to this
7 day, don't you?

8 A. Yes, sir, I do.

9 Q. You got there, in part, by loaning Mr. Jowdy money at
10 a critical stage in the development of his projects in
11 Mexico, didn't you?

12 A. That is not why I was a 39 percent member.

13 Q. You didn't put up any money on your own to get that
14 39 percent, did you?

15 A. That's incorrect.

16 Q. You borrowed money from two players, Mr. Stumpfel and
17 Mr. Lethinen, you borrowed their money.

18 You gave that money to Mr. Jowdy, and then you
19 formed a company, Baja Ventures 2006, LLC, and that's what
20 got you your almost 40 percent stake of Cabo San Lucas.

21 Isn't that true?

22 A. That is not true at all.

23 Q. So if there are documents reflecting that, they are
24 incorrect?

25 MR. HALEY: I would object.

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1 THE COURT: Sustained as to form.

2 MR. MISKIEWICZ: We'll move on.

3 THE COURT: It's 4:30.

4 If you are moving to another area you should
5 stop.

6 MR. MISKIEWICZ: Okay.

7 THE COURT: We'll break for the day.

8 We'll reconvene tomorrow at 9:30. Don't read or
9 listen to anything regarding the case. Don't discuss the
10 case. I'll see you tomorrow morning at 9:30.

11 Have a good night.

12 ALL JURORS: Good night.

13 (Jury leaves the courtroom.)

14 THE COURT: Everyone can be seated.

15 You can step down, Mr. Kenner.

16 THE WITNESS: Thank you.

17 (Witness steps down.)

18 THE COURT: Just to go back to 9080 C, to the
19 extent the government is seeking to offer this order or
20 portion of this order as a finding by the district court
21 judge in Arizona that the document -- the promissory note
22 was a forgery, that I'm not going to permit.

23 As far as I can tell the only reference to any
24 finding by the court is one sentence where the court says,
25 plaintiff's failures to respond also lends credence to the

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1 claims of forgery and false claim to Nevada citizenship.
2 But the whole rest of the order relates to essentially a
3 failure by Mr. Kenner, or by Little Isle IV to respond to
4 various discovery requests by Mr. Jowdy.

5 So the whole document refers to basically
6 failure to respond to discovery and that line I do not
7 read that as a finding by the court of forgery. I'm not
8 going to permit that.

9 MR. MISKIEWICZ: Very well, your Honor.

10 MR. HALEY: Thank you, your Honor.

11 THE COURT: Any issues we need to discuss in
12 order to save time on any sidebars tomorrow that you are
13 aware of?

14 MR. LARUSSO: Not that I know of.

15 Your Honor, is there any way to project how long
16 cross is going to be? I have a witness that has flown in
17 and he's going to be available tomorrow and he's also,
18 from what I understand, available Wednesday as well, but I
19 have to do some juggling with other witnesses.

20 Maybe the government can give us some estimate
21 of cross because I have a few hours and I was wondering if
22 he would be using the whole day tomorrow.

23 (There was a pause in the proceedings.)

24 THE COURT: Some of the jurors want to know if
25 we are going to sit a full day or half day Wednesday, I

4621

1 guess they are aware of the scheduling conflict.

2 I'm going to tell Michele to tell them I intend
3 on sitting a full day on Wednesday, everyone agrees?

4 MR. MISKIEWICZ: Yes.

5 MR. LARUSSO: Yes, your Honor.

6 MR. HALEY: I'd like to keep the juror, Judge,
7 but it's your courtroom.

8 THE COURT: Tell them they should plan on being
9 here all day on Wednesday.

10 And alternate four has a mandatory work meeting
11 on June 30th. Is he waiting too?

12 THE CLERK: He's waiting too.

13 THE COURT: Tell him not to worry, we'll address
14 that.

15 THE CLERK: Okay.

16 THE COURT: Mr. Miskiewicz, what's your best
17 estimate of how long you think it will be?

18 MR. MISKIEWICZ: It won't be all day.

19 I would like to conclude either right before or
20 shortly after lunch.

21 THE COURT: Okay.

22 Mr. LaRusso, if you have a couple hours that
23 will take the whole day.

24 MR. LARUSSO: Right, and if things break
25 differently he's about a half hour away.

1 THE COURT: You said he's available Wednesday,
2 right?

3 MR. LARUSSO: Yes, he is.

4 MR. HALEY: Your Honor actually made the
5 suggestion that perhaps the government and the defense, as
6 well as Mr. LaRusso, may reach some agreement on the
7 exhibits that I have now proffered as Kenner exhibits.

8 And if we can reach agreement on that --

9 THE COURT: We are obviously not going to have a
10 big debate in front of the jury tomorrow, I would ask the
11 government if there are particular exhibits that Mr. Haley
12 is seeking to introduce that you have objections on, to
13 figure that out.

14 Again, if some of it relates to simply the fact
15 that it's hearsay, unless there is a document in
16 particular that the government has concern about, I
17 believe for all the reasons we have already gone over
18 numerous times that to the extent Mr. Kenner wants to put
19 in e-mails or texts what other people were telling him at
20 the relevant time it should come in, I think for his state
21 of mind.

22 Why don't you see which ones you disagree on.

23 MR. MISKIEWICZ: We'll work it out.

24 There are those Excel spreadsheets that I think
25 have been marked. I can cover that on cross-examination

4623

1 and probably we will waive any objection to hearsay.

2 I would ask for the limiting instruction your
3 Honor has given with other similar exhibits.

4 THE COURT: Okay.

5 Hold on one second.

6 (There was a pause in the proceedings.)

7 THE COURT: One juror has a vacation July 16th.

8 Again, this shows how the jury is thinking based
9 on what they are seeing.

10 MR. MISKIEWICZ: I'll be done with my cross by
11 then.

12 THE COURT: They should be okay.

13 MR. HALEY: We can agree, can we not, that it
14 will be finished before July 16th?

15 THE COURT: Yes.

16 We can agree on that. Any other issues for
17 today, then?

18 MR. MISKIEWICZ: Not for the government.

19 THE COURT: There is one ruling I want to
20 amplify at the sidebar and this relates to Mr. LaRusso
21 objected to the portion of the e-mail that Mr. Haley was
22 offering where Mr. Kenner accuses Mr. Constantine of,
23 quote-unquote, misappropriating funds.

24 What I said at sidebar I want to amplify,
25 Mr. Kenner had already testified as to his belief with

1 respect to misappropriation of funds, and testified
2 without objection to the fact that he communicated his
3 belief to the hockey player investments. So what that
4 e-mail was doing was simply documenting or corroborating
5 what had already come in as testimony that he had made the
6 hockey player clients aware of what he believe to be
7 misappropriation.

8 I have already instructed the jury that that's
9 not for the truth of the matter asserted therein, so they
10 have already been given a limiting instruction. There is
11 no Bruton issue because Mr. Kenner is on the stand and can
12 be cross-examined with respect to why he believed that
13 there was misappropriation with respect to certain funds.

14 So I do not believe -- and even though it is a
15 later time Mr. LaRusso points out it is not at the time of
16 the alleged diversion. I think it was 2011 or 2010, I
17 don't remember the exact date -- actually, it was April
18 2011. It still could potentially go to Mr. Kenner's state
19 of mind.

20 So for all those reasons I believe it was
21 properly admitted into evidence. Have a good night. I'll
22 see you at 9:30.

23 MR. MISKIEWICZ: Thank you, your Honor.

24 MR. HALEY: Thank you, your Honor.

25 MR. LARUSSO: Thank you, your Honor.

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THE COURT: See you tomorrow.

(The trial was adjourned until Tuesday, June
23rd, at 9:30 a.m.)

I N D E X

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E X H I B I T S

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\$	\$38,000 [2] - 4502:3, 4502:7	1,500 [2] - 4460:3, 4589:19	16 [10] - 4448:23, 4505:20, 4507:19, 4521:14, 4521:16, 4522:10, 4609:19, 4609:23, 4615:19, 4617:9	4472:18, 4561:4, 4581:12
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